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Richard K. Spratley and Brett G. Pearce v. State Farm Mutual Automobile Insurance Company, Michael Arnold, Craig Kingman, Scott D. Kotter and Harold E. Nixon : Brief of Appellee

Utah Supreme Court

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IN THE SUPREME COURT FOR THE STATE OF UTAH

RICHARD K. SPRATLEY and BRETT G. PEARCE, **Appellants,** **vs.** **STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, MICHAEL ARNOLD, CRAIG KINGMAN, SCOTT D. KOTTER and HAROLD E. NIXON,** **Appellees.**	**Consolidated Appeal No. 20011002-SC** **Trial Court No. 010904770** **Priority No. 10**

INTERLOCUTORY APPEAL FROM THE DECEMBER 7, 2001 ORDER OF THE HONORABLE J. DENNIS FREDERICK, THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY, STATE OF UTAH

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JURISDICTIONAL STATEMENT

This Court has jurisdiction over this appeal under Utah Code Ann. § 78-2-2(j).

STANDARD OF REVIEW

The order from which this appeal was taken (hereinafter the "Order")[1] consists of a preliminary injunction, a discovery protective order, and an order disqualifying plaintiffs' counsel. The appropriate standard of review for all issues is an "abuse of discretion" standard.

This Court "will not disturb a district court's grant of a preliminary injunction unless the district court abused its discretion or rendered a decision against the clear weight of the evidence." Water & Energy Sys. Tech., Inc. v. Keil, 1999 UT 16, ¶ 6, 974 P.2d 821, 822. For over 70 years, this Court has consistently left preliminary injunctions "to the conscience of the chancellor." See Melrose v. Low, 80 Utah 356, 15 P.2d 319, 320 (Utah 1932).[2] Preliminary injunctions are equitable, and "courts have broad authority to grant equitable relief as needed." Jeffs v. Stubbs, 970 P.2d 1234, 1243 (Utah 1998).

The Court has repeatedly "stated that the district court is entrusted with broad discretion in dealing with discovery matters, namely, protective orders." In re Discipline of Pendleton, 2000 UT 77, ¶ 38, 11 P.3d 284, 294. See R & R Energies v. Mother Earth Industries, Inc., 936 P.2d 1068, 1080 (Utah 1997). This Court applies this deferential standard "'[b]ecause trial courts must deal first hand with the parties and the discovery process.'" Utah Dept. of Transp. v. Osguthorpe, 892 P.2d 4, 6 (Utah 1995)(citation omitted).

With respect to decisions on disqualification of counsel, "the proper standard of review . . . is abuse of discretion." Houghton v. Utah Dep't of Health, 962 P.2d 58, 61

[1] A copy of the Order is attached as Addendum 1.

[2] See also Carrier v. Lindquist, 2001 UT 105, ¶ 26, 37 P.3d 1112; System Concepts v. Dixon, 669 P.2d 421, 425 (Utah 1983); Salt Lake County v. Kartchner, 552 P.2d 136, 139 (Utah 1976).

(Utah 1998).[3] See Cheves v. Williams, 1999 UT 86, ¶ 57, 993 P.2d 191, 205. The Court applies this standard because "[t]rial courts are usually given broad discretion in controlling the conduct of attorneys in matters before the court." Margulies v. Upchurch, 696 P.2d 1195, 1199 (Utah 1995).

Despite the foregoing authorities, plaintiffs ask the Court to apply a *de novo* standard of review across the board in this case. The cases they cite in support of this standard are factually and procedurally inapposite,[4] or completely inapplicable.[5] The standard advocated by plaintiffs would hamstring the district court's ability to craft equitable remedies and to manage this case. The extent to which the Order involved mixed factual and legal questions may affect the *breadth* of the district court's discretion, but not the abuse of discretion standard itself. See Jeffs v. Stubbs, 970 P.2d 1234, 1244 (Utah 1998); State v. Pena, 869 P.2d 932, 937-39 (Utah 1994).

DETERMINATIVE LAW

The following statutes and rules are determinative of the issue presented in this appeal:

Rule 504, Utah Rules of Evidence

Rule 507, Utah Rules of Evidence

Rule 26(c), Utah Rules of Civil Procedure

Rule 1.6, Utah Rules of Professional Conduct

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[3] Such discretion is limited to the extent it invokes this Court's interest in administering ethical rules. See Houghton, 962 P.2d at 61. Yet, when disqualification involves factual disputes and "less-tangible" factors, "a trial court is naturally in a better position to consider and weigh . . . their application to the legal standard at issue." Id. The district court faced factual disputes and considered intangible factors and this Court should grant the district court discretion reflecting the court's unique position to weigh such factors.

[4] See Debry v. Goates, 2000 UT App 58, 999 P.2d 582.

[5] See Valcarce v. Fitzgerald, 961 P.2d 305 (Utah 1998); State v. Robinson, 932 P.2d 1219 (Utah 1997). Even under the standard advanced by appellants, "this court will uphold a district court's ruling of law on any ground made available to the court below, whether expressly relied upon or not." Doe v. Maret, 1999 UT 74, ¶ 5, 984 P.2d 980, 982.

Preamble, Utah Rules of Professional Conduct

Utah Code Ann. § 78-24-8(2)

The complete text of these statutes and rules are attached, respectively, as tabs A-F of Addendum 2 hereto.

STATEMENT OF THE CASE

A. Nature of the Case

In this case, Richard Spratley and Brett Pearce, former in-house lawyers for State Farm, sued State Farm and some of its claims department personnel for damages relating to the termination of their employment. Early in the action, it became apparent that Messrs. Spratley and Pearce had taken copies of documents and computer files with them when they left State Farm, and that many of these documents and files contained information that State Farm views as confidential and/or privileged. The documents and files were also covered by a confidentiality agreement signed by both Spratley and Pearce. Messrs. Spratley and Pearce made it clear that they intended to use these documents and files in prosecuting their case against State Farm and the other defendants without regard to their written confidentiality agreement and without regard to the confidential or privileged character of the information.

Because Spratley and Pearce are already in possession of information that would normally be obtainable by a plaintiff, if at all, only after a showing of discoverability and a determination that they were not privileged, State Farm and the other defendants were faced with a situation that turned the usual discovery mechanisms on their head. State Farm, as a defendant, was forced to assume a proactive role if it was to protect its confidential and privileged information from public disclosure and from misuse by the plaintiffs. Accordingly, State Farm filed a motion for a preliminary injunction and a protective order to obtain the return of the documents and files, and to establish ground rules for determining privilege and confidentiality questions before Spratley and Pearce could disclose information that they had in their possession. In its motion papers, State

Farm contended that Spratley and Pearce's possession and/or use of this information contravened both a nondisclosure agreement they had signed and their professional obligations as former counsel for State Farm and its insureds.

State Farm also moved to disqualify the Christensen & Jensen law firm as counsel for Spratley and Pearce. The basis for this motion was that Spratley and Pearce had already disclosed confidential and/or privileged information to their counsel, and that they likely would disclose further information. Christensen & Jensen has a number of other related matters pending against State Farm to which this information would be pertinent. To prevent further tainting of the firm with wrongfully obtained confidential and /or privileged information, State Farm argued that the firm should be disqualified from representing Spratley and Pearce.

The district court entered an Order granting State Farm's motion for preliminary injunction and protective order, and its motion to disqualify counsel. These orders are before this court on an interlocutory appeal.

Although plaintiffs' brief before this court expends much of its energy on issues pertinent to the merits of the case, this is not an appeal from a ruling on the merits of Messrs. Spratley and Pearce's claims against State Farm and the other defendants. Except for preliminary rulings required by Rule 65A to be made in support of the grant of a preliminary injunction[6], the district court did not address the merits of the case, nor did it decide whether specific files or documents are or are not privileged.

B. Statement of Facts

The statement of facts appearing in Messrs. Spratley and Pearce's brief consists, for the most part, of unproven contentions drawn from their affidavits filed in the district court, and selective quotations from some of the many State Farm documents that they

[6] Rule 65A(e) requires a showing that "[t]here is a substantial likelihood that the applicant will prevail on the merits of the underlying claim, or the case presents serious issues on the merits which should be the subject of further litigation."

took with them when they left State Farm's employment.[7] State Farm denies the plaintiffs' contentions on the merits. These contentions, however, do not bear on the issues before the court, which are limited to whether the district court abused its discretion in entering a preliminary injunction, protective order, and disqualification order.

In support of the motions that led to the district court's Order, State Farm presented a series of affidavits that focused on State Farm's entitlement to preliminary relief, to a protective order, and to the disqualification of appellants' counsel. Messrs. Spratley and Pearce presented no evidence refuting the material statements in these affidavits. Because little discovery has been taken, and because the standard of review is abuse of discretion, it is appropriate to consider the facts in a light most favorable to the trial court's ruling. See Chadwick v. Nielsen, 763 P.2d 817, 820-21 (Utah Ct. App. 1988). Therefore, the following facts are taken from the pleadings and from the affidavits filed by State Farm.

1. *Spratley and Pearce's relationship with State Farm*

Richard Spratley and Brett Pearce acted as in-house attorneys for State Farm for more than a decade. (R. 3). Mr. Spratley came to work for State Farm in 1987 as "house counsel" for the company's Utah office. In January 1991, he became managing attorney for State Farm's Claims Litigation Counsel ("CLC") office in Salt Lake City. In that capacity, he practiced law and managed other State Farm in-house attorneys. Mr. Pearce came to work as a State Farm attorney in the CLC office in 1990. (R. 665-66). In June 2000, both Mr. Spratley and Mr. Pearce resigned from State Farm and went into private practice. (R. 4). In their new roles, they portray themselves as offering a unique

[7] State Farm and other defendants have not had the opportunity to conduct discovery on appellants' contentions. Defendants have not even been able to obtain copies of the documents that appellants took from State Farm, despite their having been ordered to turn them over.

perspective on State Farm to whose wishing to assert claims against State Farm. (R. 264).

Both Mr. Spratley and Mr. Pearce were, as they allege in their Complaint, "hired [by State Farm] to provide legal services for State Farm and State Farm insureds." (R. 3). Like all other lawyers employed by State Farm's CLC office, they represented State Farm itself in litigation and arbitration proceedings brought directly against the company. They also represented State Farm policyholders in litigation brought by third parties, pursuant to policy provisions that entitle State Farm to select counsel and direct the litigation of covered claims. (R. 1397-98). In both capacities—as counsel for the company and as counsel for its policyholders—Mr. Spratley and Mr. Pearce communicated regularly with the individual defendants in this case and other State Farm claims department personnel to provide advice about coverage issues, litigation strategy, discovery, trial preparation, and settlement. (R. 666).

At all relevant times, the State Farm claims department considered its relationship with Messrs. Spratley and Pearce (like all CLC lawyers) to be a confidential attorney-client relationship. (R. 641). The claims department personnel who regularly conferred with these lawyers about claims handling practices, litigation strategy, coverage issues, and settlement issues believed their communications were confidential. (Id.). Claims personnel do not disclose such communications outside State Farm and only disclose them to parties within State Farm who are involved in the cases for which the attorneys were providing advice. (Id.).

2. *Spratley and Pearce's agreement to protect confidentiality*

Like all other employees in the Salt Lake City CLC office, Messrs. Spratley and Pearce expressly agreed to keep confidential the non-public information they obtained as a result of their employment. Specifically, State Farm's Code of Conduct required CLC employees to keep all non-public information related to State Farm and its insureds strictly confidential and to protect such information from unauthorized disclosure or use.

The Code of Conduct further provided that "[t]o protect confidentiality and to preserve applicable legal privileges, the discussion of State Farm's legal matters should be restricted to those with a need to know." (R. 665, 668, 670-72). Both Mr. Spratley and Mr. Pearce agreed to comply with the Code of Conduct and affirmed their intent to comply in the future. Each year, they stated in writing whether they had violated the Code, and affirmed that they would comply with it in the future. (R. 665). As the managing attorney of the Salt Lake City CLC office, Mr. Spratley was responsible for ensuring compliance with the Code of Conduct. (Id.)

3. *Spratley and Pearce's resignation from State Farm*

While Mr. Spratley was the managing attorney for its Salt Lake City CLC office, State Farm repeatedly expressed concerns to him about his diligence as an attorney and about problems related to his management of the office. (R. 89). In January 2000, Mr. Spratley stepped down as the manager of the CLC office, but remained an attorney employed with the office. (R. 1730). Mr. Pearce applied for Mr. Spratley's former position. (R. 1488-89). In June 2000, when Mr. Pearce was not promoted to replace Mr. Spratley, both resigned from State Farm. (R. 4). On January 11, 2001, almost six months before Spratley and Pearce commenced this case, State Farm's attorney sent them a letter reminding them of their obligations not to disclose privileged communications derived from their employment with State Farm. (R. 150).

4. *Spratley and Pearce's disclosure of confidential information*

Messrs. Spratley and Pearce are now in possession of State Farm documents and computer files that they took with them, a number of which are confidential and/or privileged. They have refused so far to return the documents and files, and they have been unwilling to disclose how many or which documents and files they took. In taking these records with them, Spratley and Pearce were clearly undaunted by the fact that they were acting in violation of their express written agreements with State Farm.

The documents and computer files taken and disclosed to date relate to the legal services Mr. Spratley, Mr. Pearce, and other State Farm lawyers provided to State Farm and its policyholders. (R. 24-53, 347; 1456-91; 1657-1740). These materials were apparently taken to assist Spratley and Pearce in prosecuting this case and in starting a private practice oriented to claims against State Farm. Shortly after they left State Farm, their new firm announced their practice in a promotional internet website as follows:

> From the "If you can't beat them, join them" department:
>
> . . . .
> Richard Spratley and Brett Pearce have for more than a decade been the top two in-house attorneys for State Farm Insurance in Utah. These two excellent attorneys got fed up with State Farm and now want to represent individual accident victims with claims against their former employer. . . . We are pleased to welcome them into the fold, as they crossover from the legions at State Farm. We look forward to utilizing their keen and fresh insights into the inner workings of State Farm.

(R. 264).

Messrs. Spratley and Pearce have made it clear that they intend to base their prosecution of this case on confidential information obtained in their capacity as State Farm lawyers, without regard either to their express agreement to maintain the confidentiality of information gained while employees of State Farm or to the obligations of confidentiality that arose by reason of their legal representation of State Farm and its insureds. They have already filed with the court some of the confidential materials they took with them. (R. 51, 347). These documents not only discuss specific cases involving State Farm and individually named policyholders, but also disclose the content of confidential communications between lawyer and client. For example:

Campbell Memoranda—Mr. Spratley advised State Farm in its defense of Campbell v. State Farm, 2001 UT 89, cert. granted, 122 S. Ct. 2326 (2002). Intermittently over a period of about eight years, he consulted with other in-house

lawyers, outside counsel and witnesses involved in the case. Although Mr. Spratley did not enter an appearance in the case, State Farm's Director of Legal Services asked Mr. Spratley in 1988 to review the Campbell file and provide his evaluation. After reviewing the file, Mr. Spratley provided State Farm with a confidential written case evaluation. (R. 657). In 1994, Mr. Spratley prepared another confidential memorandum to State Farm providing advice relating to the Campbell case. (R. 661-62). In 1996, Mr. Spratley assisted a State Farm employee in preparation for a deposition and hearing in the Campbell case. (R. 645). Throughout this period, Mr. Spratley was frequently provided with copies of confidential internal memoranda in the case. (R. 657). The plaintiffs in Campbell are represented by Christensen & Jensen—the same lawyers who now represent Spratley and Pearce in this case. Mr. Spratley has now disclosed information relating to both of the memoranda he prepared for State Farm. (R. 690: Second Spratley Aff., ¶ 13 & Exh. 4). State Farm does not know what other Campbell materials Mr. Spratley has in his possession or may have disclosed to his counsel.

Partington Correspondence—On September 7, 1994, Mr. Spratley met with State Farm Divisional Claim Superintendent Brad Partington to discuss certain issues relating to discovery, trial, and the use of experts in litigation for both State Farm and its policyholders. When Mr. Partington memorialized their confidential meeting in two letters, he believed that the letters would be held in confidence. (R. 635-36). Mr. Spratley, however, took copies of the letters with him when he left State Farm and annexed them as exhibits to an affidavit he filed in this case. (R. 347).

Pearce/Kotter Correspondence—On February 16, 1999, Mr. Pearce conferred with State Farm's Michael Arnold and Scott Kotter concerning his settlement authority in a specific case that Mr. Pearce was handling for a State Farm insured. Mr. Pearce then wrote Mr. Kotter confirming the substance of the telephone conversation. Both Mr. Kotter and Mr. Arnold believed that the conversation and the letter were privileged and confidential. (R. 644, 651-52). Mr. Pearce, however, took a copy of the letter when he

resigned from State Farm and annexed it as an exhibit to an affidavit he filed in this case. (R. 347).

Arnold/Kingman Memorandum—In September 1999, State Farm's claims managers Mike Arnold and Craig Kingman met with Spratley, Pearce and other CLC lawyers to discuss litigation handled by the CLC office. The claims managers assumed that their discussions would be held in strict confidence and thus spoke frankly about problems they perceived in the handling of State Farm cases and about general litigation strategy. (R. 643). Mr. Arnold and Mr. Kingman issued an internal memorandum summarizing the meeting for the benefit of those present. They believed this memorandum would be held in confidence. (R. 643). Spratley and Pearce, however, took the memorandum with them when they left State Farm and annexed a copy of it as Exhibit 5 to their Complaint. (R. 51).

These are only examples. For about a decade State Farm claims personnel regularly met with Messrs. Spratley and Pearce about litigation they were handling for both State Farm and its policyholders. State Farm believed that their meetings and written communications with these lawyers were protected by the attorney-client privilege and by their written confidentiality agreements. Yet Messrs. Spratley and Pearce advised the district court that they intend to make these communications the centerpiece of this case. Thus they have filed affidavits making allegations that either directly disclose privileged communications, or refer to such communications in a manner that will necessitate eventual disclosure to prove the allegations. Mr. Spratley and Mr. Pearce intend to disclose communications concerning decisions State Farm made to settle or litigate particular cases (R. 347: Spratley Aff. ¶¶ 7(h), 7(j) & 7(l); Pearce Aff. ¶¶ 10(b), 10(d) & 10(f)); to assert particular defenses in particular cases (R. 347: Spratley Aff. ¶ 7(c); Pearce Aff. ¶ 10(e)); to retain particular experts in litigation (R. 347: Spratley Aff. ¶ 7(d); Pearce Aff. ¶ 10(h)); to file offers of judgment in particular cases (R. 347: Spratley Aff. ¶ 7(f)); to conduct discovery in particular cases (R. 347: Spratley Aff.

¶ 7(g)). Also to be disclosed are communications regarding discussions between State Farm and its lawyers concerning the evaluation of the merits of particular cases (R. 347: Spratley Aff. ¶ 7(h); Pearce Aff. ¶¶ 10(d) & 10(f)).

5. *Christensen & Jensen's representation of parties adverse to State Farm*

The defendants' sought disqualification of the law firm of Christensen & Jensen, and the district court ordered it, because this firm now has access to an unknown, but obviously large body of confidential and /or privileged State Farm information pertinent to this and other cases it is prosecuting against State Farm. Each of the firm's other cases against State Farm challenge the alleged litigation and claims handling practices about which Messrs. Spratley and Pearce have already disclosed privileged information in this case. Specifically:

a. *The Campbell case*

Over the course of eight years, Mr. Spratley advised State Farm regarding legal issues arising in Campbell v. State Farm, pending before the United States Supreme Court on appeal from this Court on a grant of certiorari from this Court. As described above, Mr. Spratley received confidential communications concerning the case, and he provided advice on the case to his superiors and others in State Farm. In an article appearing in the *Deseret News* on June 20, 2001, Mr. Humpherys was quoted as saying the following about the present case: "There are correlations and overlaps with the Campbell case, and there's no question there is some relationship and similarities in the evidence." (R. 351-52). Spratley and Pearce assert that their claims are based on an alleged "pervasive scheme" at issue in the Campbell case, and they have submitted a copy of an order from the Campbell case in support of this assertion. (R. 94, 114). Mr. Spratley also draws comparisons to the Campbell case in an affidavit he filed in this case. (R. 347: Spratley Affidavit, ¶ 9(c)).

b. *The Mosier case*

In Mosier ex rel Lone Tree Services, Inc. v. State Farm Mutual Automobile Insurance Company, Case No. 99091180 (Third Jud. Dist. Ct., filed November 23, 1999), Christensen & Jensen represents the bankruptcy trustee of a State Farm insured in a bad faith claim against State Farm. (R. 354). The trustee alleges, among other things, that State Farm unreasonably delayed in acting on the debtor's claims, unreasonably investigated the claims, unreasonably refused to settle them, and unreasonably denied coverage. (R. 356-64). The court in Mosier ordered that discovery be bifurcated between the issues (1) whether the State Farm policy covered the claims, and, if so, (2) whether State Farm acted in bad faith in denying the claim. State Farm is currently pursuing an interlocutory appeal from the trial court's finding of coverage. Plaintiff's claims involve the types of issues—if not exactly the same issues—on which Mr. Spratley and Mr. Pearce regularly advised State Farm during their employment.

c. *The Fidel case*

In Melia Fidel v. Tiffany K. Maughan and State Farm Mutual Automobile Insurance Company, Case No. 990910933 (Third Jud. Dist. Ct., filed October 29, 1999), Christensen & Jensen represents a plaintiff challenging State Farm's claims handling and litigation practices (R. 368-76), including State Farm's practices relating to coverage of verdicts in excess of policy limits. (R. 429, 452-53). She challenges the conduct of a particular State Farm agent—defendant Scott Kotter in this case—with whom both Mr. Spratley and Mr. Pearce had confidential communications over much of their careers at State Farm. (R. 380, 383, 429). Plaintiff also contends that one of the physicians retained by State Farm to examine her was not independent. This is one of the same physicians about whom Mr. Spratley has already made disclosures in paragraph 7(d) of his affidavit in this case.

d. *The Green case*

In State Farm Mutual Automobile Insurance Company v. Lora Green et al., Case No. 96-0400447 (Fourth Jud. Dist. Ct., filed July 1, 1996), Utah S. Ct. Case No. 20010316, Christensen & Jensen represents a State Farm policyholder in a dispute with State Farm over underinsured motorist benefits. Christensen & Jensen has asserted that State Farm's claims employees failed adequately to investigate Ms. Green's underinsured motorist claim and unreasonably delayed or refused to consent to a settlement. (R. 464, 468, 490-91). Christensen & Jensen has specifically challenged the conduct of Mike Arnold—a defendant in this case—with whom Messrs. Spratley and Pearce routinely conferred for years. Christensen & Jensen's attempted discovery of State Farm claims personnel and lawyers prompted State Farm to seek a protective order preventing discovery regarding State Farm's litigation strategy—including practices challenged in this case—and internal claims communications. (R. 526, 528-29). The court deferred such discovery pending resolution of underlying contractual issues. Following cross-motions for summary judgment, the court granted summary judgment in State Farm's favor, ruling that the terms of the policy prevented plaintiff from recovering underinsured motorist benefits. (R. 332). Christensen & Jensen has appealed the ruling to this Court.

e. *The Williams case*

At the time the district court entered the Order in the present case, Christensen & Jensen represented the plaintiff in Anna Williams v. State Farm Mutual Automobile Insurance Co., Case No. 998902955 (Third Jud. Dist. Ct., filed September 3, 1999), a claim against State Farm for unpaid personal injury protection benefits. The plaintiff challenges the credibility and independence of the physician on whose opinion State Farm relied in denying personal injury protection benefits. After unsuccessfully asserting her claim against State Farm in small claims court, the plaintiff filed an appeal in Third District Court. (R. 548-55). As in Williams, Messrs. Spratley and Pearce in the present

case challenge State Farm's use of particular medical experts. This is a topic on which both appellants conferred frequently with State Farm during their employment.

C. Course of Proceedings and Disposition in the Court Below

After leaving State Farm with confidential and privileged materials, and after announcing that they had set themselves up in law practice to represent persons with claims against State Farm, Messrs. Spratley and Pearce filed their Complaint in this case on May 31, 2002. From the inception of this action, it was clear to all parties that the propriety of the plaintiffs' possession, use, and disclosure of non-public information obtained while employed by State Farm is a central issue. It was also clear to all parties that plaintiffs' possession of this information turned the normal discovery process, and the normal privilege determination process applicable to discovery requests, on their heads. Plaintiffs had obtained protected material that they would otherwise have been required to discover only in accordance with the rules; defendants had no opportunity to object to its production or obtain a determination of its confidential or privileged status before it was disclosed to or by the plaintiffs.

On August 10, 2001, counsel for the parties held a planning conference pursuant to Utah Rule of Civil Procedure 26(f), during which counsel for Messrs. Spratley and Pearce stipulated:

> Issues surrounding the confidentiality and privilege to be accorded to evidence which may support either the claims or defenses in this case are particularly problematic in light of the facts that (a) during the entire period of their employment for defendant State Farm Mutual Automobile Insurance Company, both plaintiffs acted as attorneys for State Farm, and (b) plaintiffs' case involves communications with State Farm concerning plaintiffs' handling of litigation for State Farm and its policyholders.

(R. 187-88). In the same stipulated Rule 26(f) Planning Conference Scheduling Order, "[t]he parties agreed that it is essential to obtain the direction of the Court addressing

these issues before initial disclosures and commencement of discovery." (R. 188).[8] After making these stipulations, defendants propounded minimal written discovery, but did not take any depositions or other discovery. Plaintiffs propounded no discovery at all.

In an effort to correct the problems created by plaintiffs' removal and disclosure State Farm's documents, State Farm filed a motion for preliminary injunction and protective order, pursuant to Rules 65A and 26(c), Utah Rules of Civil Procedure. State Farm asked the court to establish ground rules to assist the parties in resolving the confidentiality and privilege issues identified by the parties' proposed Rule 26(f) Planning Conference Scheduling Order. (R. 230). In as much as Messrs. Spratley and Pearce contended that they had no obligation to protect what State Farm contended was confidential or privileged information, State Farm's motion sought an order that would prospectively prevent them from violating the attorney-client privilege and their duties under Rule 1.6, Utah Rules of Professional Conduct. The motion also sought an order requiring Spratley and Pearce to return the confidential documents they took from State Farm in violation of their written agreement. The motion was supported by six affidavits of State Farm employees. (R. 633-674). In opposition, Spratley and Pearce submitted their own affidavits which dealt summarily with attorney-client issues, asserting that much of their activity at State Farm was administrative. They also made assertions relevant to the merits of their claims against the defendants. Neither plaintiff denied, however, that he provided legal services to both State Farm and its insureds. (R. 690).

State Farm also filed a motion to disqualify Christensen & Jensen. (R. 317-19). State Farm supported its disqualification motion with filings from other cases in which Christensen & Jensen represents parties adverse to State Farm, demonstrating that the issues in those cases were closely related to issues about which Spratley and Pearce had confidential information. (R. 348-629).

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[8] Although the parties stipulated to the terms of the proposed Scheduling Order, it was never signed by the district court.

On December 7, 2001, after oral argument, the district court entered an order (the "Order") in the form of a minute entry granting both motions. (R. 2557-60). Regarding State Farm's motion for preliminary injunction and protective order, the Order concluded that State Farm had grounds to object to the disclosure of communications between it and plaintiffs, both with respect to their direct representation of State Farm and with respect to their representation of State Farm's insureds. It noted that "after reviewing the relevant case law, it is clear the majority of jurisdictions hold an attorney hired by an insurance company to defend its insured represents the insurer, absent any conflict of interest, in something akin to a 'dual client status.'" (R. 2558). The court then ruled that, "[w]hile neither side disputes that the primary duty, when an attorney is hired to provide defense under an insurance policy, is to the insured, the Court finds, and the case law supports, that such does not necessarily limit the ability of the insurer to assert attorney-client privilege." (Id.).

Based on these principles, the district court ordered Messrs. Spratley and Pearce to:

1. Refrain from disclosing (in this litigation or otherwise) confidential communications and information exchanged between Spratley or Pearce on the one hand, and State Farm and/or its insureds on the other hand, relating to the provision of legal services by Spratley, Pearce or other lawyers for State Farm, or made for the purpose of facilitating such services;

2. Refrain from disclosing any facts relating to Spratley or Pearce's representation of State Farm's insureds, absent express consent to disclosure by the insureds; and

3. Return to State Farm all confidential documents materials, and information that Spratley and Pearce created, maintained or acquired as part of their employment with State Farm, and that are currently in their possession.

(Id.).

In deciding to disqualify Christensen & Jensen, the district court adhered to the test established in Cade v. Zions First Nat'l Bank, 956 P.2d 1073, 1081 (Utah Ct. App.

1991). (R. 2559). The court held that Spratley and Pearce obtained State Farm's confidential and privileged litigation strategies and necessarily divulged this information to Christensen & Jensen, and that continued disclosures of such information threatened to taint all further proceedings in this case. (R. 2559). Hence, the court ruled, "[w]hile motions to disqualify are to be viewed with extreme caution, because privileged communications are the centerpiece of this case, the Court is of the opinion that disqualification, as requested by defendants, is appropriate." (Id.).

After the district court entered the December 7 Order, Messrs. Spratley and Pearce petitioned this court for interlocutory review. Their petition essentially ignored the preliminary nature of the district court's Order and the fact that the district court had not actually addressed the confidential and/or privileged character of specific documents. Instead, Messrs. Spratley and Pearce shifted their attention to the merits of the case. To that end, they stated that "[i]f the challenged materials are not confidential and privileged, then petitioners can proceed to prove their case. If the challenged materials are determined to be otherwise, then petitioners would be unable to proceed and the matter would be resolved." (R. 2670). Based on this concession regarding the merits of the case, State Farm and the other defendants moved the district court for summary judgment on Spratley and Pearce's claims. (R. 2654-55). This court stayed proceedings in the district court before briefing was complete on State Farm's summary judgment motion. The motion for summary judgment is not before this court on appeal.

SUMMARY OF THE ARGUMENT

The injunctive portions of the district court's Order were designed to correct the problems stemming from Spratley and Pearce's removal of confidential and privileged State Farm documents in violation of an express confidentiality agreement, and then disclosing them in a suit against State Farm. The district court's injunction was also designed to address Spratley and Pearce's claim that they had no duty to keep any of the documents they removed confidential, no duty to respect the confidentiality of other

communications with State Farm, no duty to refrain from public discussion of facts relating to their representation of State Farm's policyholders over a decade, and no duty to return the documents and files taken in violation of their express agreement. The Order directed the return of the documents and files to State Farm and gave the parties prospective guidelines to assist them in sorting out particular confidentiality and privilege issues as the case moves forward. While State Farm supported its request for the Order with references to privileged documents disclosed by Spratley and Pearce, the Order did not determine that any particular document was or was not privileged. In toto, this portion of the Order responded to the parties' stipulation that "it is essential to obtain the direction of the Court" on privilege and related issues before commencement of discovery.

In their opening brief to this court, Messrs. Spratley and Pearce contend that their confidential communications with State Farm are not protected from disclosure because they did not have an attorney-client relationship with State Farm and owed it no other duty of confidentiality. This argument fails for at least three reasons. First, much of their legal work over the decade of their employment was undertaken directly for State Farm in connection with the settlement of claims by minor persons, no-fault PIP arbitrations, uninsured motorist claims, and the like. There can be no question about the applicability of the attorney-client privilege to communications involved in this work.

Second, as to legal work undertaken at State Farm's direction for policyholders, Messrs. Spratley and Pearce still owed a duty of confidentiality to State Farm, whether or not this court concludes that Spratley and Pearce had both State Farm and its insureds as clients, or only the insureds. The vast majority of courts that have considered the question have held that insurance defense lawyers represent—and owe duties of confidentiality to—both the policyholder and the insurer. Regardless of the existence of an attorney-client relationship between lawyer and insurer, the lawyer still owes a duty of confidentiality to the insurer as to confidential communications that facilitate the

representation of policyholders. In either event, the district court correctly concluded that Spratley and Pearce owed a duty of confidentiality to State Farm.

Third, and independent of the attorney-client privilege, Rule 1.6, Utah Rules of Professional Conduct, prohibits Messrs. Spratley and Pearce from disclosing facts relating to their representation of policyholders without policyholder consent. Messrs. Spratley and Pearce have already disclosed sensitive details of their representation of policyholders—without consent—and they have threatened to do so in the future as an integral part of their case against State Farm. The plaintiffs' brief does not seriously deal with this issue.

Spratley and Pearce also argue that, for a number of reasons, they are exempt from the normal duties of lawyer confidentiality. These arguments are all without merit. Rule 1.6(b)(3), Utah Rules of Professional Conduct, which allows lawyers to reveal information necessary to establish a claim or defense against a client, does not affect the scope of the attorney-client privilege. Rule 504(d)(3), Utah Rules of Evidence, which is the "breach of duty" exception to the privilege, has been narrowly interpreted by the courts to permit disclosure of privileged communications only in suits by lawyers to collect unpaid fees. Rule 504(d)(1), the crime-fraud exception to the privilege, does not apply here because plaintiffs failed to establish a crime or fraud, and have not even attempted to comply with the rule: rather than establishing the predicates for the exception by independent evidence and then submitting the privileged material to the district court for *in camera* evaluation, Messrs. Spratley and Pearce simply attached privileged communications to their Complaint and affidavits and then filed them. Most importantly, the crime-fraud exception needs to be considered on a document-by-document basis, not as a wholesale excuse for disclosing all of appellants' confidential communications over a decade. Finally, State Farm has not waived the protection of the privilege as to confidential communications with its lawyers; it has certainly not done so, as plaintiffs claim, by publishing general statements about the Claims Litigation Counsel

program. If Messrs. Spratley and Pearce believe that State Farm has waived the privilege as to a particular document, nothing in the Order prevents them from raising the issue in the appropriate way.

The Order was a proper exercise of the district court's discretion to enter a preliminary injunction under Utah Rule of Civil Procedure 65A(e) and a protection order under Utah Rule of Civil Procedure 26(c). The district court correctly ordered plaintiffs to refrain from disclosing confidential information relating to representation of State Farm and its insureds. The threatened violation of a lawyer's duty to refrain from using client confidences has been recognized as the basis for injunctive relief for at least a century. Indeed, authorities from around the country have repeatedly affirmed injunctions virtually identical to the Order in this case. State Farm and the other defendants are therefore likely to prevail on the merits. Further, since the confidential nature of lawyer-client communications is permanently impaired by disclosure, State Farm faced irreparable injury unless the injunction issued. The only "harm" Messrs. Spratley and Pearce faced was that they would be enjoined from using information they had no right to use in the first place. The district court therefore did not abuse its discretion in preventing Messrs. Spratley and Pearce from disclosing privileged information.

The Order also appropriately required Spratley and Pearce to return to State Farm all confidential documents and files in their possession as a means of restoring the status quo before the material was taken. The documents and files were taken in direct violation of a written confidentiality agreement.

The district court appropriately exercised its discretion in disqualifying Christensen & Jensen as counsel for Messrs. Spratley and Pearce. Without the Order, Christensen & Jensen would have had ready access to State Farm's confidential and privileged communications for use in this and other cases involving issues about which Messrs. Spratley and Pearce have knowledge, all without having to demonstrate that the

information is discoverable. Their filings in this case disclosed privileged information bearing directly on issues in other cases in which Christensen & Jensen appears as counsel against State Farm. Unless they are disqualified, Messrs. Spratley and Pearce will inevitably continue to disclose privileged communications because they are integral to their prosecution of the case. Christensen & Jensen's continued representation of the appellants in this case therefore threatened to taint all further proceedings, justifying the disqualification order.

The Court should affirm the Order in all respects.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY ISSUED A PRELIMINARY INJUNCTION AND PROTECTIVE ORDER TO ESTABLISH GROUND RULES FOR DISCOVERY AND TRIAL IN THIS UNUSUAL CASE

Plaintiffs' principal arguments against the Order are that it is vague, that it is premature, and that it misplaced the burdens normally associated with establishing the protections of the attorney-client privilege. They argue that the district court's Order was too general because applicability of the privilege must be addressed on a case-by-case basis, with the proponent of the privilege having the burden of proof. See App. Br. at 36-37. These arguments, however, ignore the fundamental purpose of the Order—to correct the upside down situation created when plaintiffs wrongfully removed confidential and privileged materials from State Farm and then used them in mounting their suit. The Order was not intended to determine whether any particular document or communication was or was not privileged. It was intended, rather, to establish prospective guidelines necessitated by the unique circumstances of this case, circumstances created by Spratley and Pearce. The most important of those circumstances were the following:

First, Mr. Spratley and Mr. Pearce secretly removed confidential computer files and documents from State Farm's offices when they left their employment in violation of repeated written promises to State Farm. They intended to use them—as State Farm viewed it—in violation of their duties to State Farm and its policyholders under the

attorney-client privilege and Rule 1.6. To this day, State Farm does not know what documents Spratley and Pearce took, except as Spratley and Pearce have chosen to release them piecemeal in this case. When State Farm asked for the return of the documents and then for their production as part of discovery, Spratley and Pearce refused to produce them. When the district court ordered them to be produced, Spratley and Pearce still refused to produce them.

Second, in their affidavits, Mr. Spratley and Mr. Pearce made plain their intention to base their case on the confidential documents they removed and on other client communications. The confidential records Spratley and Pearce took from State Farm are not just going to be an incidental part of the case; rather, they intend to make this a high-profile showcase for their access to confidential communications with State Farm, its claims personnel, and its lawyers.

Third and most importantly, Mr. Spratley and Mr. Pearce made it clear that they believe they have no duty to keep any of the documents they removed confidential. They and their attorneys profess to believe that they are completely unrestrained by the attorney-client privilege, by their specific written agreements to keep State Farm records confidential, or by Rule 1.6 of the Utah Rules of Professional Conduct. Spratley, Pearce, and their lawyers advanced the position that these limitations simply did not apply to them in their dealings with State Farm over the previous decade.

As a result of the foregoing, State Farm faced a dilemma. If it proceeded to defend the case without first attempting to correct the unfairness created by plaintiffs' having taken State Farm's confidential records, it would be required publicly to discuss documents and communications it assumed were privileged and confidential, and to do so in the presence of Spratley and Pearce's retained counsel, who concurrently represented other plaintiffs in cases against State Farm on related issues. In short, State Farm was presented with the choice either to protect its privilege or defend the case.

This dilemma is exemplified by the plaintiffs' attachment to their Complaint of a State Farm document that is clearly marked "**Privileged and Confidential**." (R. 1089). In a normal case, appellants would have requested such documents under Utah R. Civ. P. 34. State Farm would then object to the production under Utah R. Civ. P. 26(b)(1), which permits discovery of "any matter, not privileged." Spratley and Pearce would obtain a privilege log from State Farm, detailing the document's nature, and use this information to challenge the protectability of this document in a motion to compel under Utah R. Civ. P. 37. State Farm would then have the initial burden of showing the applicability of the privilege, and Spratley and Pearce would have the burden of proving any exceptions to the privilege. The trial court would then decide whether the document should be produced. In the present case, however, there was no opportunity to follow these procedures because they had been trumped by Spratley and Pearce's wrongful removal of the document from State Farm's files and its filing in open court.

Messrs. Spratley and Pearce no longer seem to acknowledge the severity of the problem they created by taking the documents and using them at will. At the outset of the case, however, both sides agreed that ground rules on privilege and confidentiality issues were needed before discovery could proceed. Thus, in their proposed Rule 26(f) Planning Conference Scheduling Order, the parties stipulated that issues of confidentiality and privilege "are particularly problematic" and that "it is essential to obtain the direction of the Court addressing these issues before initial disclosures and commencement of discovery." (R. 188).

Pursuant to this stipulation, State Farm moved for a preliminary injunction and a protective order. To demonstrate the need for ground rules, State Farm used particular documents attached to the Complaint as examples of privileged materials taken by plaintiffs and then made public. However, it did not ask for a detailed determination as to the privileged character of all the documents made public. State Farm was unable to move as to many of the particular documents for which it sought protection because

State Farm did not know—and still does not know—which documents and computer files were removed by Spratley and Pearce, with the exception of the documents attached to plaintiffs' Complaint and affidavits. In response, the district court issued an Order that was both prospective and general because the circumstances required such an order.

Spratley and Pearce claim that State Farm failed to meet its burden in proving that specific documents are privileged. This is a red herring for at least two reasons. First, State Farm does not know what documents and communications plaintiffs possess, much less which ones they plan to make public. Second, the problem is not that Spratley and Pearce threatened to disclose a particular document. The problem is that they intend to disclose many of documents and oral communications with State Farm and its policyholders, all without regard for any duties of confidentiality that bind them. Both parties needed the guidance of the court on whether Spratley and Pearce owe duties of confidentiality to State Farm and its insureds. If, as we believe, Messrs. Spratley and Pearce are bound by the normal rules that lawyers must observe and by their express confidentiality agreements, then the parties will have a framework within which to debate the privileged character of particular documents. The Order establishes such a framework.

Another red herring is the contention that the district court's Order protected communications relating to Spratley and Pearce's administrative duties at State Farm's CLC office. State Farm does not seek to prevent—and the district court's Order did not prohibit—disclosure of communications involving administrative functions. The Order, rather, (1) prevented disclosure of confidential communications made to facilitate the legal services Messrs. Spratley and Pearce provided to State Farm and its policyholders; (2) prevented disclosure of facts relating to their representation of policyholders; and (3) directed return of the documents wrongfully taken from its files. Absent the Order, these ordinary and proper concerns could not be vindicated by orderly presentation of the issues before the district court. Without the Order, Spratley and Pearce would have

continued their wholesale disclosure of protected communications, causing irreparable harm in their wake.

II. THE LAW PROHIBITS SPRATLEY AND PEARCE FROM DISCLOSING PRIVILEGED COMMUNICATIONS WITH, AND CONFIDENTIAL COMMUNICATIONS CONCERNING, STATE FARM AND ITS POLICYHOLDERS

The injunctive provisions of the district court's Order were based on the attorney-client privilege as set forth in Utah Rule of Evidence 504, the confidentiality agreement between State Farm and plaintiffs, and the duty of lawyers under Utah Rule of Professional Conduct 1.6 to refrain from disclosing facts relating to the representation of a client without the client's consent. Plaintiffs' brief focuses almost exclusively on the "dual client" question, i.e., whether Spratley and Pearce had an attorney-client relationship with both State Farm and its insureds in the context of third party claims against insureds. Their brief does not seriously address either of the other two grounds for the Order's injunctive provisions, Rule 1.6 of the Utah Rules of Professional Conduct and the express confidentiality agreement with State Farm.

Despite their failure to acknowledge it, plaintiffs frequently represented State Farm as a party to litigation and in arbitrations. Confidential communications relating to such cases are clearly protected, and plaintiffs cannot seriously contend otherwise. Concerning their representations of State Farm policyholders, the district court held—we believe correctly—that Messrs. Spratley and Pearce represented both State Farm and the policyholders. This court, however, does not need to reach the correctness of this holding because the authorities have consistently held that insurance defense counsel owe a duty of confidentiality to the insurer, even if it is not labeled a "client."

As for rule 1.6 and plaintiffs' confidentiality agreement, the district court was well within its discretion in finding that plaintiffs' conduct to date, as well as their expressed intentions for the future, demonstrate that they have actually violated and intend to

continue to violate their duties under the rule and the agreement. The district court's award of injunctive relief was entirely appropriate and should be affirmed.

A. Spratley and Pearce Are Bound By the Attorney-Client Privilege to Protect Confidential Communications Relating to Their Direct Representation of State Farm

The attorney-client privilege shields the confidentiality of communications between clients and their lawyers. See Utah R. Evid. 504(b); Utah Code Ann. § 78-24-8(2). It protects "communications made for the purpose of facilitating the rendition of professional legal services." Utah R. Evid. 504(b) (emphasis added). The privilege is designed to "encourage candor between attorney and client and promote the best possible representation." Gold Standard, Inc. v. American Barrick Resources, 801 P.2d 909, 911 (Utah 1990). The privilege protects a corporation's communications with inside counsel, including "the giving of information to the lawyer to enable him to give sound and informed advice." See id. 504(c); Upjohn Co. v. United States, 449 U.S. 383, 389-91 (1981). Because the privilege belongs to the client, which the lawyer must safeguard, the client is entitled to halt the disclosure of confidential attorney-client communications. See Utah R. Evid. 504(b).

Messrs. Spratley and Pearce directly represented State Farm in a number of matters, including minor settlements, no-fault PIP arbitrations, and uninsured motorist claims. (R. 1394). They also advised State Farm employees on legislative and case law developments in insurance coverage issues. (Id.). As their complaint alleges, "[a]s part of their employment duties, sometimes [Spratley and Pearce] would directly represent State Farm's interests in cases which were in or anticipated to be in litigation." (R. 3). Spratley and Pearce themselves note that their claims surround "cases in litigation being handled by [Spratley and Pearce] in [sic] *behalf of State Farm* or State Farm's insureds," not just the insureds. (R. 4, 188) (emphasis added). In situations where Spratley and Pearce directly represented State Farm, the attorney-client privilege unquestionably attaches.

Spratley and Pearce have already disclosed privileged communications relating to their representation of State Farm, and they have threatened to disclose still others. (R. 347).[9] The Order appropriately enjoined them from violating the privilege in relation to their direct representation of State Farm.

B. Spratley and Pearce Are Bound By the Attorney-Client Privilege to Protect Confidential Communications Relating to Their Representation of State Farm Policyholders

Messrs. Spratley and Pearce also represented State Farm policyholders under the terms of their insurance policies. In entering its Order, the district court followed the rule adopted by the majority of the nation's jurisdictions that have considered the question and concluded that the attorney-client privilege shields an insurer's confidential communications with the attorneys it hires to represent its insureds. Therefore, it held that the privilege protects confidential communications between plaintiffs and State Farm to facilitate these services. Although State Farm believes that this decision was correct, this court need not reach it to affirm the Order insofar as it applies to plaintiffs' representation of policyholders. For, as demonstrated in the first part of this Argument below, even if the court were to reject the "dual client" doctrine, the law still imposes a duty of confidentiality upon Spratley and Pearce.

1. *Duties based on the obligation of confidentiality to insurers regardless of their client status*

In the latest version of the Restatement of the Law Governing Lawyers, the American Law Institute notes that regardless of the existence of an attorney-client relationship between an insurer and counsel for the insured, the latter still owes a duty of confidentiality to the insurer. For example, "communications between the lawyer and representatives of the insurer concerning such matters as progress reports, case

[9] This portion of the record contains Spratley and Pearce's first affidavits. Mr. Spratley disclosed communications relating to his direct representation of State Farm in ¶ 7(j) of his Affidavit, and Mr. Pearce disclosed the same type of communications in ¶ 10(f) of his Affidavit. While these affidavits impermissibly disclose privileged communications, State Farm denies the claims in these affidavits.

evaluations, and settlement should be regarded as privileged." Restatement (Third) Of The Law Governing Lawyers § 14, cmt. f. Messrs. Spratley and Pearce routinely communicated with State Farm regarding such matters as progress reports, case evaluations, and settlement—all of which the Restatement says should be regarded as privileged. The Restatement further provides:

> [A] lawyer owes a duty of care . . . to a nonclient when and to the extent that:
>
> (a) the lawyer knows that a client intends as one of the primary objectives of the representation that the lawyer's services benefit the nonclient;
>
> (b) such a duty would not significantly impair the lawyer's performance of obligations to the client; and
>
> (c) the absence of such a duty would make enforcement of those obligations to the client unlikely.

Restatement (Third) of the Law Governing Lawyers, § 51(3). Under these principles:

> [A] lawyer designated by an insurer to defend an insured owes a duty of care to the insurer with respect to matters as to which the interests of the insurer and insured are not in conflict, whether or not the insurer is held to be a co-client of the lawyer.

Id. at cmt. G (emphasis added). The Restatement's recognition of a duty under these circumstances is consistent with this court's recent recognition that the "modern trend is to abandon or relax the privity requirement recognizing that under certain circumstances a lawyer may have a duty to exercise reasonable care to a non-client." Oxendine v. Overturf, 973 P.2d 417, 421 (Utah 1999).[10]

Spratley and Pearce knew that State Farm relied on them to provide legal services to the insured, their representation of policyholders provided a benefit to State Farm because those services fulfilled contractual obligations State Farm owed to the insured.

[10] Although this Court did not recognize non-client duties in Oxendine due to issues under Utah's wrongful death statute, no such issues are present in this case.

Moreover, unless Spratley and Pearce owed a duty to State Farm, which supervised their work for insureds, it is "unlikely" (in the words of the Restatement) that the duties of these lawyers would be otherwise enforced, given the contractual delegation to State Farm by the insureds of the supervision of counsel and the conduct of the litigation.

Thus regardless whether Utah recognizes the "dual client" doctrine (see below), Spratley and Pearce nevertheless owed duties of confidentiality to State Farm. Spratley and Pearce are not permitted to pick and choose those to whom they owe duties of confidentiality, particularly when the only policy justification they offer for being freed of all such duties is that it will permit them to benefit financially, as by this suit or by selling their confidential knowledge in the marketplace to persons who wish to sue State Farm.

2. ***Duties based on the tri-partite relationship.***

The district court concluded that when the insured is sued by a third party, there is a "dual client" relationship between Spratley and Pearce, on the one hand, and State Farm and its insureds, on the other. The "tri-partite" nature of this relationship is well established in jurisdictions across the nation. "Counsel retained by an insurer to defend its insured has an attorney-client relationship with the insurer," as well as the insured. Gulf Ins. Co. v. Berger, Kahn, Shafton, Moss, Figler, Simon & Gladstone, 79 Cal.App.4th 114, 127 (2000). "This concept of dual or joint representation has been widely acknowledged, and sanctioned by the courts." State v. Second Judicial Dist. Court, 783 P.2d 911, 913 (Mont. 1989) (citing cases). Dual representation recognizes that, in claims like those handled by Spratley and Pearce for insureds, both the insurer and the insured have a "primary, overlapping and common interest [in] the speedy and successful resolution of the claim and litigation." American Mut. Liab. Ins. Co. v. Superior Court, 38 Cal.App.3d 579, 591 (1974).

Because the attorney-client privilege belongs to the client, and because both the insured and the insurer are the attorney's clients, the privilege "clearly encompasses both

insured and insurer." Id. at 593-94. Hence, when an insurer engages an attorney to defend its insured, the privilege protects communications between (i) the attorney and the insured, and (ii) the attorney and the insurer. See id. at 594.

Of course, "each member of the trio, attorney, client-insured, and client-insurer has corresponding rights and obligations founded largely on contract and, as to the attorney, by the Rules of Professional Conduct as well." Id. at 591-92. Included among these obligations is the attorney's obligation to take remedial measures, including withdrawing, if a conflict develops between the insurer and the insured. See Utah R. Prof. Conduct, 1.7. Within this framework, insurance defense counsel's primary duty is to the insured. However, unless and until an actual conflict arises, the insurance defense counsel has two clients: the insured and the insurer.

Messrs. Spratley and Pearce concede that the majority of courts have recognized the doctrine of dual representation.[11] But they ask this Court to side with the minority and, in doing

[11] See, e.g., Mitchum v. Hudgens, 533 So. 2d 194 (Ala. 1988) (when insurance company retains attorney to defend action against insured, attorney represents insured as well as insurer in furthering the interests of each other); Home Indem. Co. v. Lane Powell Moss & Miller, 43 F.3d 1322 (9th Cir. 1995) (insured and insurer are both represented by the attorney as long as there is no conflict of interest); Paradigm Ins. Co. v. Langerman Law Offices, 24 P.3d 593, 597 (Ariz. 2001) (defense counsel can represent both insurer and insured unless there is an actual conflict or the potential for conflict in the particular case is great); Waste Management, Inc. v. International Surplus Lines Ins. Co., 579 N.E.2d 322, 329 (Ill. 1991) ("[W]hen insurer retains attorney to defend insured, attorney represents both insured and insurer in furthering the interests of each."); Cincinnati Ins. Co. v. Wills, 717 N.E.2d 151 (Ind. 1999) (attorney represents both the insured and insurer; dual representation permissible even when the attorney was in-house counsel for the insurer, because their interests are aligned); Brasseaux v. Girouard, 214 So. 2d 401 (La. Ct. App. 1968) (an attorney may simultaneously represent the insured and insurer); Shahan v. Hilker, 488 N.W.2d 577, 581 (Neb. 1992) ("'[C]ommunication made by an insured to his liability insurance company, concerning an event which may be made the basis of a claim against him covered by the policy, is a privileged communication, as being between attorney and client, if the policy requires the company to defend him through its attorney, and communication is intended for the information or assistance of the attorney in so defending him.'"); Campbell v. Maestro, 996 P.2d 412 (Nev. 2000) (explaining that a "dual agency" relationship exists between the insured, insurer, and attorney, and the insurer has the right to control the litigation); Lieberman v. Employers

so, misstate the case law from other jurisdictions. Plaintiffs anchor their position to In re Rules of Professional Conduct & Insurer Imposed Billing Rules & Procedure, 2 P.3d 806 (Mont. 2000). As its name indicates, the Rules of Professional Conduct case addressed the propriety of insurer billing requirements under the Rules of Professional Conduct, and did not deal with the scope or existence of the attorney-client privilege. This case did not alter the principle that, in Montana (as in most jurisdictions), insurance defense counsel represents both the insured and the insurer, absent a conflict of interest. See State v. Second Judicial Dist. Court, 783 P.2d 911 (Mont. 1989). The Montana Supreme Court has recognized that "[t]his concept of dual or joint representation has been widely acknowledged, and sanctioned by the courts." Id. at 913. Taken together the Rules of Professional Conduct case and the Second Judicial District Court case stand for the proposition that, absent a conflict of interest, insurance defense attorneys represent both insurer and policyholder. See 2 P.3d at 811. See also Jessen v. O'Daniel, 210 F. Supp. 317 (D. Mont. 1962); Palmer v. Farmers Insurance Exchange, 861 P.2d 895 (Mont. 1993); and Safeco Ins. Co. v. Ellinghouse, 725 P.2d 217 (Mont. 1986).

Having misread Montana law, Messrs. Spratley and Pearce advance no other cases that squarely address the applicability of attorney-client privilege. Five of their cases[12] stand for nothing more than the general principle that an insurance defense attorney's primary duty is to the insured—a principle to which State Farm adheres. Other cases they advance concern superfluous legal principles and inapposite facts. For example, in

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Ins. of Wausau, 419 A.2d 417 (N.J. 1980) (recognizing attorney has two clients, the insured and insurer unless a conflict arises); In re Conduct of O'Neal, 683 P.2d 1352 (Or. 1984) (referencing dual representation of insurer and insured as example of situations where attorney can represent multiple clients if it is obvious the lawyer can represent the interests of each client without conflict); Barry v. USAA, 989 P.2d 1172 (Wash. Ct. App. 1999) (normally an attorney operates on behalf of two clients, the insurer and the insured).

[12] See Continental Casualty Co. v. Pullman, Comley, Bradley & Reeves, 929 F.2d 103, 108 (2nd Cir. 1991); Gibbs v. Lappies, 828 F. Supp. 6, 7 (D.N.H. 1993); Dempsey v. Associated Aviation Underwriters, 141 F.R.D. 248, 252 (E.D. Pa. 1992); Finley v. Home Ins. Co., 975 P.2d 1145 (Haw. 1998); Higgins v. Karp, 687 A.2d 539, 543 (Conn. 1997).

First American Carriers v. Kroger Co., 787 S.W.2d 669 (Ark. 1990), two attorneys at the same law firm represented opposing parties to the same suit: a former client (through the client's insurer) and a current client. The court held that the law firm's continued representation of both sides created an appearance of impropriety, and that the firm should have disqualified itself. See id. at 671. The court noted in passing that policyholders are an insurance defense lawyer's primary client, but gave no further heed to this issue, and did not even mention the attorney-client privilege in the dual representation context.

In State Farm Mut. Auto. Ins. Co. v. Traver, 980 S.W.2d 625 (Tex. 1998), another of plaintiffs' cases, the court held that an insurer is not vicariously liable for malpractice committed by counsel the insurer selects to defend an insured. Traver did not, however, concern dual representation or the attorney-client privilege. Smith v. Anderson-Tulley Co., 608 F. Supp. 1143 (S.D. Miss. 1985) and Jackson v. Trapier, 247 N.Y.S.2d 315 (Sup. Ct. N.Y. 1964), two other cases Spratley and Pearce cite, did not address the issue of attorney-client privilege between an insurer and defense counsel.

The Court should decline appellants' invitation to join the minority. The district court correctly recognized the overlapping interests between insurer and insured justifying a privileged relationship with insurance defense counsel. If these interests diverge, the insurance defense counsel's primary duty is to the insured and counsel must take remedial measures. Unless and until an actual conflict arises, dual representation continues and the insurer may assert the attorney-client privilege.[13]

[13] At pages 39-40 of their brief, Messrs. Spratley and Pearce argue that State Farm's policyholders never consented to dual representation and that dual representation is therefore barred by Rule 1.7(b), Utah Rules of Professional Conduct. Rule 1.7(b) prohibits a lawyer from representing a client if the representation "may be materially limited" by the lawyer's responsibilities to another party unless (among other things) the client consents after consultation. Rule 1.7(b) simply never applied here because Spratley and Pearce's representation of policyholders was never "materially limited." Had their responsibilities to State Farm ever hindered their representation of policyholders, they were required by both Rule 1.7(b) and by State Farm policy to withdraw. Further, the language of the insurance policies in question gave State Farm the

C. Spratley and Pearce Owe a Duty of Confidentiality to State Farm Policyholders Under Rule 1.6 of the Rules of Professional Conduct

A second reason for the Order's injunctive provisions was to prevent Spratley and Pearce's violation of Rule 1.6, Utah Rules of Professional Conduct. That rule provides that "[a] lawyer shall not reveal information relating to representation of a client except as stated in paragraph (b), unless the client consents after consultation." Paragraph (b) of Rule 1.6 then lists four exceptions, none of which applies here in relation to policyholders.[14] Rule 1.6(a) thus precludes Messrs. Spratley and Pearce from revealing any information relating to their representation of State Farm's policyholders without their consent. "The confidentiality rule applies not merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source." Id. at cmt. This duty continues even after the attorney-client relationship is terminated. See Heinecke v. Utah Dept. of Comm., 810 P.2d 459, 468 n.14 (Utah Ct. App. 1991).

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right and the duty to defend policyholders in covered claims litigation. Courts construing such policies have held that they "invest the insurer with the complete control and direction of the defense . . . to the exclusion of the insured." Davenport v. St. Paul Fire & Marine Ins. Co., 978 F.2nd 927, 931-32 (5th Cir. 1992) (citing authorities); See also Safeco Ins. Co. v. Superior Court, 71 Cal. App. 4th 782, 787 (1999). Under its policies with insured, State Farm had the right to select defense counsel on covered claims, approve the legal strategy, and approve any settlement. The policyholder's acceptance of these terms constituted "consent" to dual representation.

[14] Paragraph (b) of rule 1.6 reads as follows:

(b) A lawyer may reveal such information to the extent the lawyer believes necessary:

(1) To prevent the client from committing a criminal or fraudulent act that the lawyer believes is likely to result in death or substantial bodily harm, or substantial injury to the financial interest or property of another;

(2) To rectify the consequences of a client's criminal or fradulant act in the commission of which the lawyer's services had been used;

(3) To establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client or to establish a defense to a criminal charge ro civil claim against the lawyer based upon conduct in which the client was involved; or

(4) To comply with the Rules of Professional Conduct or other law.

The record developed to date shows that Messrs. Spratley and Pearce have repeatedly disclosed sensitive details of their representation of State Farm policyholders, without consent, in violation of Rule 1.6. The fourth set of affidavits they filed are riddled with facts relating to their representation of dozens of State Farm policyholders, including details of the policyholders' inculpatory conduct, family matters, and assets and income. (R. 1456-91; 1657-1740). Although some of these disclosures have come under seal, they were nevertheless made without consent in violation of Rule 1.6. More importantly, Messrs. Spratley and Pearce cannot try their case under seal. In the absence of the Order, facts protected by Rule 1.6 will inevitably be divulged to parties other than counsel and the courts.

In their brief, Messrs. Spratley and Pearce never directly address the problem, except to note that they do not *intend* to violate Rule 1.6, ignoring the fact that they have already done so. State Farm has standing to raise its policyholders' rights because otherwise these rights are unlikely to be raised at all, and because such standing furthers the public's interest in confidential legal representation. See Jenkins v. Swan, 675 P.2d 1145, 1150 (Utah 1983), Restatement (Third) of the Law Governing Lawyers, § 51(3)(c). On this score, the Order was necessary and well within the district court's discretion.

D. Spratley and Pearce Owe a Duty to State Farm Not to Disclose Confidential and Non-Public Information by Reason of Their Written Agreement with State Farm.

The State Farm Code of Conduct required signators to maintain the confidence of all non-public information related to State Farm and its insureds which they obtained as a result of their employment. The Code of Conduct also specifically addressed the handling of confidential and privileged material relating to representation of State Farm and its insureds: "[t]o protect confidentiality and to preserve applicable legal privileges, the discussion of State Farm's legal matters should be restricted to those with a need to know." (R. 665, 668, 670-72). Both plaintiffs annually executed a written commitment to adhere to the State Farm Code of Conduct. Both plaintiffs breached it willfully.

Before the district court, State Farm presented this written agreement and pointed out that Spratley and Pearce's own filings with the district court demonstrated their breach of the agreement, first by taking confidential and privileged documents with them when they left State Farm, and then by filing them with the court. Spratley and Pearce have not contested this fact; instead, they ignore it. And they have demonstrated their intention to continue to disclose to the court and the public confidential and privileged information, documents, and files gathered while employed by State Farm. Once confidential or privileged documents are revealed, there is no way to remedy the breach of the duty to keep them confidential. Thus, the only practical means for protecting these materials was to enjoin Spratley and Pearce from disclosing them further.

If Messrs. Spratley and Pearce wish to obtain confidential or privileged information and then use it to support their case, they may proceed under the Utah Rules of Civil Procedure to seek its discovery and a determination that it is not protected. The Order contemplates just such a process. But they are not free to ignore their written obligations to State Farm and its policyholders. The district court did not abuse its discretion in entering its Order based on evidence that Spratley and Pearce breached an express agreement on confidentiality.

III. NEITHER EXCEPTIONS TO THE RULES OF PROFESSIONAL CONDUCT AND EVIDENCE, NOR WAIVER SHOULD RELIEVE SPRATLEY AND PEARCE OF THEIR DUTIES

In response to the district court's determination that the Order was necessary to prevent further breaches of confidentiality and revelations of privileged information, Messrs. Spratley and Pearce contend that their conduct falls within exceptions in the rules. They contend that they are entitled to rely on an exception to Utah Rule of Professional Conduct 1.6's ban on disclosure of information relating to representation of a client, on several exceptions to the attorney-client privilege contained in Utah Rule of Evidence 504, and on State Farm's alleged waiver of any claim of confidentiality. As

will be shown below, there is no merit to any of these post hoc rationalizations for Spratley and Pearce's willful disclosures of confidential information.

A. Rule 1.6(b)(3) Does Not Allow Spratley and Pearce to Disclose Privileged Information

Messrs. Spratley and Pearce argue that Rule 1.6(b)(3), Utah Rules of Professional Conduct, allows them to violate their duties of confidentiality to State Farm. Rule 1.6(b)(3) provides:

> "A lawyer may reveal such [confidential] information [pertaining to the relationship between the attorney and the client] to the extent the lawyer believes necessary . . . [t]o establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client or to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved."

Spratley and Pearce contend that because they assert a claim against State Farm, they are free to disclose all confidential information gained as a result of the relationship. State Farm and the other defendants disagree for two reasons.

First, Rule 1.6 imposes upon Spratley and Pearce a broad obligation of confidentiality not only with respect to State Farm, but also with respect to the policyholders whom Spratley and Pearce represented. Although Spratley and Pearce may have a dispute with State Farm, they have never asserted claims against its policyholders. As a result, they cannot justify the disclosure of information pertaining to their representation of policyholders by referring to rule 1.6(b)(3).

Second, Rule 1.6(b)(3) does not constitute an exemption from the attorney-client privilege under Utah Rule of Evidence 504. The Preamble to the Utah Rules of Professional Conduct provides that the Rules are "not intended to govern or affect judicial application of either the client-lawyer or work product privilege." Utah R. Prof. Conduct, Preamble. "The fact that in exceptional situations the lawyer under the Rules has a limited discretion to disclose a client confidence does not vitiate the proposition that, as a general matter, the client has a reasonable expectation that information relating

to the client will not be voluntarily disclosed." Id. Hence, as a matter of Utah law, Rule 1.6(b)(3) does not affect the attorney-client privilege's application to Spratley and Pearce's communications with State Farm. And it certainly has no bearing on a written agreement of confidentiality executed as a condition of their employment.

The protections of Rule 1.6 are different from the attorney-client privilege, both in terms of purpose and scope; exceptions recognized under one have no bearing on the scope of the other. Rule 1.6 confidentiality is broader than the privilege, applying "not merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source." Utah R. Prof. Conduct, 1.6 cmt. Rule "1.6 is much broader than the attorney-client privilege." Samaritan Foundation v. Goodfarb, 862 P.2d 870, 889 (Ariz. 1993). As recognized in In re Rules of Professional Conduct, 2 P.3d 806 (Mont. 2000), on which Messrs. Spratley and Pearce rely, "by its plain language, Rule 1.6 . . . extends to *all* communications between insureds and defense counsel and this rule is therefore broader in both scope and protection than the attorney-client privilege." Id. at 822.[15] Since Rule 1.6 is broad in scope, its exceptions are also broad. The attorney-client privilege, by contrast, provides protection to a narrowly defined set of communications, and its exceptions are correspondingly narrow. See id. Exceptions to Rule 1.6 were never designed to negate the privilege, and Rule 1.6(b)(3) provides neither an exception to the privilege, nor a valid basis for a challenge to the Order.

Burkhart v. Semitool, Inc., 5 P.3d 1031 (Mont. 2000), a case cited by Spratley and Pearce, illustrates the point. At issue in Burkhart was whether in-house counsel are categorically precluded from bringing claims against their employer. See id. at 1036. The court permitted such claims, "as long as such an action may be proven within the

[15] See Douglas v. DynMcDermott Petroleum Operations Co., 144 F.3d 364, 369 (5th Cir. 1998); Brennan's, Inc. v. Brennan's Restaurants, Inc., 590 F.2d 168, 172 (5th Cir. 1979); In re Ethics Advisory Panel Opinion No. 92-1, 627 A.2d 317, 322 (R.I. 1993); State v. Sheppard, 763 P2d 1232, 1235 (Wash. App. 1988).

confines of the attorney's respective ethical obligations to maintain client confidences." Id. The court noted that the "claim or defense" exception to Rule 1.6 applies to such claims. See id. at 1042. However, the court cautioned that this exception does not extend to privileged communications. Specifically, the court stated that "'where the elements of a wrongful discharge . . . claim cannot, for reasons peculiar to the particular case, be fully established without breaching the attorney-client privilege, the suit must be dismissed in the interest of preserving the privilege.'" Id. 1038 (quoting General Dynamics Corp. v. Superior Court, 876 P.2d 487, 503-04 (Cal. 1994)).[16]

B. The "Breach of Duty Exception" Under Utah R. Evid. 504(d)(3) Does Not Apply to this Dispute

Messrs. Spratley and Pearce also contend that they may ignore their confidentiality obligations under the "breach of duty" exception in Utah R. Evid. 504(d)(3), which provides that "[n]o privilege exists under this rule . . . [a]s to a communication relevant to an issue of breach of duty by the lawyer to the client or by the client to the lawyer." This exception does not extend to the type of dispute presented by this case because courts have wisely limited its application to only two types of cases: (1) clients' lawsuits against lawyers for malpractice, and (2) lawyers' lawsuits against clients for unpaid fees. For rule 504(d)(3)'s purposes, "'breach of duty by the attorney usually involves professional malpractice, incompetence, or ethical violations, while a breach by a client usually means not paying a fee.'" Byrd v. State, 929 S.W.2d 151, 154 (Kan. 1996)(citation omitted). In client versus lawyer cases, the "exception to an attorney's duty to guard client confidences creates a defensive mechanism for lawyers under siege." 3 Weinstein Federal Evidence § 503.33 (2d ed. 2001). In lawyer versus client cases, Rule 504(d)(3) "means that the client cannot assert the privilege to prevent revelation of his

[16] Crews v. Buckman Labs. Int'l, Inc., 2002 WL 1050247 (Tenn. 2002), another case cited by Spratley and Pearce, discusses only Rule 1.6 and never mentions the separate attorney-client privilege.

secrets when the lawyer sues to recover his fee." See also Wright & Graham, Federal Practice and Procedure § 5503 at 534. Apart from a lawyer's claims for fees, "the exception is designed to function only as a shield, not as a sword." Siedle v. Putnam Invs., 147 F.3d 7, 11 (1st Cir. 1998). "The attorney should not be permitted to use confidential information offensively." 3 Weinstein Federal Evidence § 503.33.[17]

Courts and commentators thus favor "a strict construction" of the breach of duty exception. See Wright & Graham, Federal Practice and Procedure § 5503 at 542. Accordingly, "[t]he exclusion has been interpreted to be very limited." Shafnaker v. Clayton, 680 So. 2d 1109, 1111 (Fla. Ct. App. 1996). They reason that if Rule 504(d)(3) were not narrowly interpreted, the breach of duty exception "might open the door to a form of genteel blackmail in which the client is coerced into settling a questionable claim by fear of exposure of his confidences." Wright & Graham, Federal Practice and Procedure § 5503 at 542. In applying the exception, "sound policy requires the court to insure that the threat of divulgence is not held over the client's head as a tactical weapon." 3 Weinstein Federal Evidence § 503.33 (2d ed. 2001).

In this case, Messrs. Spratley and Pearce hold privileged communications over State Farm's head as a tactical weapon, not as a defensive refuge or a means of collecting unpaid fees. State Farm is not suing them for malpractice, and rule 504(d)(3)'s "breach of duty" exception does not permit them to violate the privilege. This case concerns the propriety of Spratley and Pearce's interactions with State Farm's claims department, and is far removed from a fee collection case. Spratley and Pearce may only wield rule 504(d)(3) as a shield, not as a sword, and it does not exempt them from their obligations under the attorney-client privilege.

Spratley and Pearce support their reliance on rule 504(d)(3) by citing Salt Lake Legal Defender Ass'n v. Uno, 932 P.2d 589 (1997), a case dealing solely with the work

[17] Even in fee collection cases, "[i]t has been suggested that the exception should be more carefully examined when the attorney sues the client for a fee than when the client sues the attorney." Id.

product doctrine, not the privilege, and which specifically noted that the work product doctrine is "[u]nlike the privilege." Id. at 590. They also cite Kalyawongsa v. Moffett, 105 F.3d 283 (6th Cir. 1997), a fee collection case that expressly recognized the exception's limitation to disclosures "necessary to establish the fee or defend against accusations of wrongful conduct." Id. at 291. They also cite First Fed. Sav. & Loan v. Oppenheim, Appel, Dixon & Co., 110 F.R.D. 557 (S.D.N.Y. 1986), a case that rejected the application of rule 504(d)(3), noting its limited application and that it does "not contemplate an exception to the privilege merely because it [is] in the attorney's pecuniary or legal interest to make the disclosure." Id. at 561.

Messrs. Spratley and Pearce insist that they may disclose privileged communications under rule 504(d)(3) because State Farm has raised their poor professional performance as an affirmative defense. The affirmative defense, however, would not exist without Spratley and Pearce's claims; they may not bootstrap an affirmative defense into an abrogation of the principles governing rule 504(d)(3). Under the breach of duty exception, "[t]he mere bringing of the action . . . does not necessarily forfeit a client's protection under the privilege." Rice, Attorney-Client Privilege in the United States, (West 1999). "That the privileged communications occurred in the course of a transaction which is later litigated [does] not eliminate the privilege." Volpe v. Conroy, Simberg & Ganon, P.A., 720 So. 2d 537, 539 (Fla. Ct. App. 1998).

C. The "Crime or Fraud" Exception Under Utah R. Evid. 504(d)(1) Does Not Apply to this Dispute

Messrs. Spratley and Pearce also argue that their conduct is excused under Utah Rule of Evidence 504(d)(1), which provides that no attorney-client privilege exists "[i]f the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud". State Farm and the other defendants deny that they were party to any fraud or crime; they also deny that plaintiffs have adequately pled either fraud or a crime. The

more important point, however, is that plaintiffs have failed to follow the universally recognized procedure for invoking this exception. "To invoke the crime-fraud exception, the party opposing the privilege must present prima facie evidence that the allegation of attorney participation in the crime or fraud has some foundation in fact." Intervenor v. United States (In re Grand Jury Subpoenas), 144 F.3d 653, 660 (10th Cir. 1998). See U.S. v. Zolin, 491 U.S. 554, 566 (1989); Haines v. Liggett, Inc., 975 F.2d 81, 96 (3rd Cir. 1992). Once such a preliminary showing is made, the court should conduct an *in camera* review of the privileged material to determine if the crime-fraud exception applies. See id. Only after a prima facie showing, *in camera*, that the exception applies may parties publicly disclose otherwise privileged material. See id. See also Intervenor, 144 F.3d at 660; In re General Motors Corp., 153 F.3d 714, 716 (8th Cir. 1998).

Spratley and Pearce have not even pretended to comply with the requirements of rule 504(d)(1). Instead of seeking to establish that the crime-fraud exception applies and then disclosing the information, they unilaterally disclosed privileged material to the court and the public, hoping that they could later establish the prerequisites of the exception. They seek forgiveness for their breach of the attorney-client privilege, apparently well aware that they could not make the showing necessary for permission. As one district court has said, "[i]n no procedural context may the bare, unilateral assertion that the crime-fraud exception applies justify disclosure." Prudential Ins. Co. of Am. v. Massaro, 2000 U.S. Dist. LEXIS 11985, *30 (D. N.J. 2000).

The Third Circuit recently upheld this principle in its opinion affirming the district court in Massaro. The Third Circuit rejected the same "crime/fraud" argument asserted by an in-house lawyer for an insurance company who tried to sue his former employer. The court held that the

> use of privileged material under the crime/fraud exception requires a three-step judicial process: (1) presentation of the factual basis for a good faith belief that the exception would apply, (2) in camera evaluation of the material by the court,

> and (3) affording the party opposed to disclosure "an absolute right to be heard by testimony and argument."

Prudential Ins. Co. v. Massaro, 2002 U.S. App. LEXIS 14560 at *4 (3d Cir. July 18, 2002) (citation omitted). The court noted that Prudential's in-house lawyer, Massaro, "obviously complied with none of these procedural niceties designed to protect his client, Prudential, from an improvident assertion of the crime-fraud [exception to the] privilege. Massaro had no right unilaterally to invoke the crime-fraud exception." Id. (alteration in original). Accordingly, the Third Circuit affirmed the injunction entered by the trial court preventing Massaro from disclosing privileged information. See id.

Messrs. Spratley and Pearce do not seriously claim that they can make even a prima facie showing that the crime-fraud exception applies. They assert only that the evidence is "sufficient to raise a fact issue" as to the exception's applicability. (App. Br. at 51). Raising a fact issue does not entitle Spratley and Pearce to make wholesale disclosures of privileged communications under the crime-fraud exception. And even this premise—that a fact issue was presented—was rejected by the district court when it held that Spratley and Pearce's Complaint, which attached privileged communications, failed to meet the bare pleading requirements for fraud. (R. 1456-91; 1657-1740).

Messrs. Spratley and Pearce attempt to buttress their position by citing Hermansen v. Tasulis, 2002 UT 52, 48 P.3d 235, which concerned the spousal privilege and did not even mention the attorney-client privilege. The spousal privilege at issue in Hermansen contains an exception for simple torts—an exception absent from the attorney-client privilege and was intentionally left out by the drafting committee. See id. at ¶ 35; Utah R. Evid. 504 cmt. Even in addressing the broader exceptions to the spousal privilege, this court still held that "[t]o preserve the purpose of the privilege, it cannot be found to be inapplicable simply because a party alleges a tort or crime. There must be sufficient evidence, independent of the communication, to support a finding that it was so made." Hermansen, 2002 UT at ¶ 36.

The district court did not abuse its discretion in concluding that the crime-fraud exception could not be invoked under the circumstances presented in this case

D. State Farm Has Not Waived Its Rights

Messrs. Spratley and Pearce argue that State Farm has waived any claim of attorney-client privilege because it has disclosed general information related to its CLC office. (App. Br. at 42-45). This argument, of course, does not address the confidentiality that Spratley and Pearce owe to State Farm under the Code of Conduct, nor does it address their obligations to policyholders under Rule 1.6. But even as to the attorney-client privilege, the facts do not support plaintiffs' contention that the privilege was waived.

The attorney-client privilege is not waived unless the "holder of the privilege voluntarily discloses or consents to the disclosure of any significant part of the matter or communication, or fails to take reasonable precautions against inadvertent disclosure." Utah R. Evid. 507(a). The "disclosure of insubstantial communications protected by the attorney-client privilege [does] not waive the privilege as to substantial matters." Doe v. Maret, 1999 UT 74, ¶ 16, 984 P.2d 980, 986. Messrs. Spratley and Pearce argue, in effect, that State Farm waived its right to assert the privilege with respect to all its communications with them by making public some general information about the Claims Litigation Counsel program.

Specifically, they quote a pamphlet entitled "State Farm Insurance Companies Claim Litigation Counsel," with general statements about the CLC program's structure, purpose, and administration. (R. 1320-31). They cite statements in a legal brief filed by State Farm that generally describe the CLC program's organization and administration. (R. 1286-98). They cite a letter sent by State Farm's General Counsel to CLC attorneys. The letter prescribes general litigation standards of conduct for CLC attorneys. (R. 1173-77). Each of these communications was made public; none of them was maintained in confidence.

The hallmark of the attorney-client privilege, however, is confidentiality. The communications the disclosure of which is now of concern are those confidential communications made between attorney and client to assist in the rendition of legal services. The argument that by publishing general information about the CLC program State Farm waived the protection of the privilege as to confidential matters is absurd.

But whether or not Spratley and Pearce's waiver claim has any merit, the district court's Order does not preclude them from seeking a determination that State Farm has waived the privilege as to particular documents. Issues of waiver must be decided on a document-by-document basis, not on the wholesale basis advanced by appellants. The district court's Order established a basic framework within which the parties can make decisions with respect to particular documents. That Order was well within the district court's discretion.

IV. THE DISTRICT COURT CORRECTLY ENJOINED SPRATLEY AND PEARCE FROM FURTHER VIOLATIONS OF THEIR DUTIES

Messrs. Spratley and Pearce contend that the district court improperly enjoined them from future disclosures of confidential and privileged information and documents. State Farm answers that the Order fell within the court's discretion granted by Utah Rule of Civil Procedure 65A to issue a preliminary injunction. The threatened violation of a lawyer's duty to refrain from misusing client confidences "has been recognized as the basis for an injunction for at least a century." Maritrans GP, Inc. v. Pepper, Hamilton & Scheetz, 602 A.2d 1277, 1285 (Penn. 1992); accord Restatement (Third) of the Law Governing Lawyers § 6. Utah Rule of Civil Procedure 65A(e) permits the district court to enter a preliminary injunction upon a showing that: (i) State Farm will likely prevail on the merits; (ii) State Farm will suffer irreparable injury without an injunction; (iii) the threatened injury to State Farm outweighs whatever harm Spratley and Pearce may incur from an injunction; and (iv) an injunction will not be adverse to the public interest. State

Farm satisfied its burden on each of these points, and the district court properly entered the Order.

A. State Farm is Likely to Prevail on the Merits

In proceedings below, State Farm first demonstrated that Spratley and Pearce acted as its attorneys. As this court recently held, "[a]n attorney-client relationship exists when the client reasonably believes the client represents the client's legal interests." Roderick v. Ricks, 2002 UT 84, ¶ 32. State Farm submitted six affidavits from corporate, CLC, and claims employees detailing their reasonable belief that Spratley and Pearce represented State Farm's legal interests while employed as CLC attorneys, and referencing specific documents in which confidential facets of this representation were communicated. (R. 633-74). Spratley and Pearce offered argument on the topic but no evidence refuting these affidavits. (R. 690).

State Farm next demonstrated that Spratley and Pearce took from State Farm and then disclosed in this lawsuit documents that were confidential or privileged. The record is replete with disclosures that evidence a breach of the written confidentiality agreement and of the duty owed to State Farm and policyholders under Rule 1.6 of the Rules of Professional Conduct. The record also demonstrates plaintiffs' repeated violation of the attorney-client privilege.[18]

In the face of such a showing, courts have almost uniformly enjoined attorneys from disclosing their former clients' confidences. For example, in Prudential Insurance Co. v. Massaro, 2000 U.S. Dist. LEXIS 11985 (D. N.J. 2000), aff'd, 2002 U.S. App. LEXIS 14560 (3rd Cir. July 18, 2002), Prudential sought an injunction against its former

[18] The following documents disclosed by plaintiffs fall squarely within the privilege: Exhibit 5 to plaintiffs' Complaint (R. 51-53) and Exhibit 1 to the Affidavit of Brett Pearce (R. 347); Exhibits 1 and 2 to the Affidavit of Richard Spratley (R. 347); Exhibit 2 to the Affidavit of Brett Pearce (R. 347); Exhibit 4 to the Second Affidavit of Richard Spratley (R. 690). For the convenience of the court, summaries of these exhibits are included as Addendum 4 to this brief.

in-house attorney, Massaro, to prevent the disclosure of confidential information. After challenging Prudential's sales practices, Massaro retained an attorney who was already prosecuting cases against Prudential. Massaro disclosed Prudential's confidential information to his attorney and, ultimately, the public. Prudential sued to enjoin any further disclosure of privileged information. The court concluded that Massaro violated his duties to Prudential because "[i]n-house counsel devote all of their professional legal skills to their sole corporate client. A corporate client is entitled to consider that an in-house lawyer will protect its interests and preserve its confidences in any and all legal matters." Id. at *24. Based on its finding that Massaro breached his duties, the court concluded that Prudential had satisfied the "success on the merits" prong of the permanent injunction test. See id. at *48.

Likewise, in X Corp. v. Doe, 805 F. Supp. 1298 (E.D. Va. 1992), Doe took copies of X Corp.'s files upon leaving his position as X Corp.'s in-house counsel. Doe later threatened to disclose confidential documents in a wrongful termination suit against X Corp. The latter sued Doe to enjoin disclosure of confidential information, and the court issued a preliminary injunction barring Doe's disclosure of his former client's confidential information. See id. at 1301-02.

Similarly, in Doe v. A Corp., 330 F. Supp. 1352 (S.D.N.Y. 1971), a corporation's former in-house counsel filed a shareholder's derivative suit against his former employer. In his complaint, the plaintiff made use of facts he acquired while performing legal services for his employer. See id. at 1354. The court noted that an attorney's motive for disclosing confidential information makes little difference. Instead, the "determinative factor is that the attorney's action will result in disclosure of communications made in confidence by the client to the lawyer." Id. at 1355. The court concluded that the attorney had violated his duties to his former employer/client and enjoined the attorney from disclosing confidential information. See id. at 1356.

In Breckenridge v. Bristol-Myers Co., 624 F. Supp. 79 (S.D. Ind. 1985), an in-house attorney brought an age discrimination claim against his former client/employer. In attempting to make his case against his former employer, the attorney took documents from his employer's files. The court noted that "[a]ccess to [privileged and confidential] documents by an aggrieved employee/attorney does not grant him license to collect and disseminate their contents because he believes it helpful to his cause of action." Id. at 83. The court ordered that the attorney-litigant return confidential and privileged information, and directed that such information could not be used in the litigation. See id. at 84. [19]

This case is factually indistinguishable from the foregoing cases. Like the lawyers in all of these cases, Messrs. Spratley and Pearce were in-house counsel who disclosed and threatened to disclose their former client/employer's confidential information in a lawsuit against their employer. As in Prudential, Spratley and Pearce have retained attorneys who are actively representing parties adverse to their former employer in other litigation, and they have revealed confidential information to those attorneys. As in all of the foregoing cases, Spratley and Pearce were properly enjoined from further violation of their confidentiality obligations.

Spratley and Pearce challenge the preliminary injunction by attempting to re-cast the Order as a ruling on the privilege's applicability to specific documents and by arguing that State Farm failed to show that certain of the documents Spratley and Pearce disclosed were privileged. The Order, however, was intended to give general, prospective direction to the parties and to reestablish the status quo before Spratley and Pearce took confidential and privileged documents from State Farm. Nothing in the

[19] See also Hyman Co., Inc. v. Brozost, 119 F. Supp.2d 499, 505 (E.D. Penn. 2000) (enjoining former in-house attorney from disclosing former employer's confidential information); American Motors v. Huffstutler, 575 N.E.2d 116, 121 (Ohio 1991) (enjoining former in-house attorney from testifying against former client/employer); Maritrans GP Inc. v. Pepper, Hamilton & Scheetz, 602 A.2d 1277, 1287 (Penn. 1992) (enjoining corporation's former attorneys from representing corporation's competitors because allowing such representation "would create too great a danger that [the former client's] confidential relationship with [its former attorneys] would be breached").

Order precludes Spratley and Pearce from contesting a claim of confidentiality and/or privilege as to any specific document.

In light of the evidence, the district court did not abuse its discretion in concluding that State Farm is likely to prevail on the merits of its privilege claim.

B. State Farm Faced Irreparable Harm Unless Spratley and Pearce Were Enjoined

The second element necessary for a preliminary injunction is a showing that the movant will suffer irreparable injury without an injunction. See Utah R.Civ.P. 65A(e)(ii). State Farm certainly made this showing.

Over the decade of their employment with State Farm, Messrs. Spratley and Pearce accumulated confidential, privileged, and proprietary knowledge concerning State Farm and its insureds. This case has just begun, and yet Spratley and Pearce have already disclosed confidential information, without court authorization or client consent. More such disclosures were inevitable without an injunction. Once confidences are disclosed, their secrecy cannot be recaptured. As one court noted, "[o]nce confidential attorney-client communications are disclosed, their confidential nature is permanently and irrevocably impaired. Even if [the client] were ultimately to prevail, its right to prevent disclosures of confidential information might be forever lost absent a preliminary injunction." X Corp. v. Doe, 805 F. Supp. 1298, 1303-04 (E.D. Va. 1992). This is irreparable harm at its most basic level.

The Order simply put an end to Spratley and Pearce's practice of violating State Farm's confidentiality rights. In the process, the Order prevents irreparable harm.

C. The Balance of Harms Favored State Farm

The third requirement for a preliminary injunction under rule 65A is that the threatened injury to the moving party be shown to outweigh whatever harm the injunction will cause to the other party. See Utah R.Civ.P. 65A(e)(iii). As shown above, the threatened harm to State Farm is irreparable. Once confidential or privileged information is disclosed, it cannot be returned to a confidential or privileged status. While State Farm

will suffer irreparable injury without the Order, the only "harm" to Messrs. Spratley and Pearce from the preliminary injunction is that they will be enjoined from using protected information that they had no right to use in the first instance.

The Order is narrowly drawn in the sense that it only preliminarily prevents Spratley and Pearce from disclosing privileged and protected information. If a particular document, communication, or fact is ultimately determined to be neither privileged nor otherwise protected, then it may be used. In short, there can be no "harm" to Spratley and Pearce from an order precluding their use of information which, by definition, the law protects from disclosure.

D. The District Court's Order Was Not Adverse to the Public Interest

The final requirement for a preliminary injunction is that the moving party show it will not be adverse to the public interest. See Utah R.Civ.P. 65A(e)(iv). Here, the district court's issuance of a preliminary injunction advanced the public's interest in protecting the confidentiality of the attorney-client relationship.

> The critical role that the attorney-client privilege plays in facilitating the administration of justice is beyond question . . . . the interest in preserving a durable barrier against disclosure of privileged attorney-client information is shared both by particular litigants and by the public, and it is an interest of considerable magnitude.

Siedle v. Putnam Inv., Inc., 147 F.3d 7, 12 (1st Cir. 1998) (citations omitted). "The public interest in enforcing the attorney-client privilege and attorney's duty of confidentiality is self-evident." Prudential Ins. Co. v. Massaro, 2000 U.S. Dist. LEXIS 11985, *51 (D. N.J. 2000). To condone flagrant disclosures of privileged information would damage "both to the bar's perception of its own responsibilities and to the public's perception of the sanctity of the trust it places in its attorneys." Id.

V. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN GRANTING STATE FARM A PROTECTIVE ORDER UNDER UTAH RULE OF CIVIL PROCEDURE 26(C)

Utah Rule of Civil Procedure 26(c) provides that a party may obtain a protective order "for good cause shown" to protect a party from "annoyance, embarrassment, oppression, or undue burden or expense" by ordering that "discovery not be had" or "that certain matters not be inquired into". The district court "is entrusted with broad discretion in dealing with discovery matters, namely, protective orders." In re Pendleton, 11 P.3d 284, 294 (Utah 2000). The Order prevents Messrs. Spratley and Pearce from using, disclosing, or seeking the disclosure of confidential and privileged information in litigating this case without following the ordinary procedures provided in the Utah Rules of Civil Procedure.

State Farm made the requisite showing of "good cause" for a protective order under Rule 26(c) when it demonstrated Spratley and Pearce's disclosures of protected information and their intent to continue to make such disclosures. "Adverse use of confidential information is not limited to disclosure. It includes knowing what to ask for in discovery, which witnesses to seek to depose, what questions to ask them, what lines of attack to abandon and what lines to pursue." Ulrich v. Hearst Corp., 809 F. Supp. 229, 235 (S.D.N.Y. 1992). Accordingly, "the attorney-client privilege provides sufficient 'good cause' under Rule 26(c) to grant a protective order." Fidelity & Deposit Co. v. McCulloch, 168 F.R.D. 516, 522 (E.D. Pa. 1996).

State Farm had a privileged and confidential relationship with Spratley and Pearce, who are now using or threatening to use communications and information gleaned from this relationship to sue State Farm. The Order properly prevents them from further violating their duties to State Farm by disclosing or otherwise using confidential communications in this lawsuit.

VI. THE DISTRICT COURT PROPERLY DISQUALIFIED CHRISTENSEN & JENSEN

Messrs. Spratley and Pearce and their law firm, Christensen & Jensen challenge the premise that a lawyer should ever be disqualified on the ground that the client disclosed protected information to the lawyer. They assert that if the premise is correct, no one with confidential or privileged information could obtain counsel because if the client discloses the information, the party entitled to confidentiality will be able to disqualify his opponent's lawyer. (App. Br. at 66-69.) We respectfully submit that this argument distorts the facts before the district court and ignores the factual basis for the disqualification order.

Christensen & Jensen is not just another law firm to which a client revealed confidential information about a party the client wanted to sue. Rather, Christensen & Jensen is actively representing other clients in suits against State Farm; those suits raise challenges to many of the same practices of which Spratley and Pearce complain. The confidential and privileged information that Spratley and Pearce have so far disclosed, as well as the information they presumably possess but have not yet revealed to State Farm, relates directly to those other suits. Christensen & Jensen would never have obtained access to this information if they had not represented Spratley and Pearce. Even the legal "expert" retained by Spratley and Pearce regarding this issue conceded that "[i]f Spratley and Pearce have violated their ethical or legal duties to State Farm in providing information to Humpherys then Humpherys can be disqualified on the grounds that the information he has acquired is 'tainted.'" (R. 715). This Court should hold that the district court's disqualification Order was not an abuse of discretion.

A. The District Court Applied the Correct Legal Standard for Disqualification

Messrs. Spratley and Pearce contend that Utah law provides no clear legal standard for determining disqualification claims in cases like the present one. (App. Br. at 66 In Cade v. Zions First Nat'l Bank, 956 P.2d 1073 (Utah Ct. App. 1991), however,

the Utah Court of Appeals analyzed the grounds for disqualifying attorneys who have impermissibly obtained confidences belonging to another attorney's former client. Although it did not definitively rule on the merits of the plaintiff's motion to disqualify opposing counsel, the Utah Court of Appeals noted that the following inquiries govern disqualification in this situation:

> (1) whether the disclosing party had "confidential or privileged information pertaining to [the movant's] trial preparation and strategy"; (2) whether the disclosing party disclosed that information to opposing counsel; and (3) whether, in light of such disclosure, opposing counsel's "continued representation . . . threatens to 'taint' all further proceedings in this case."

Id. at 1081 (citations omitted). This formulation of relevant factors is consistent with the Utah Rules of Professional Conduct[20] and with factors considered by courts in other jurisdictions in cases that are strikingly similar to this case. In applying these

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[20] In addition to the disqualification test stated in Cade, the Utah Rules of Professional Conduct mandate that, even in the absence of an attorney-client relationship with the affected client, a lawyer is not permitted to facilitate another lawyer's impermissible disclosure of client confidences:

> Not only is every lawyer responsible for observing the Rules of Professional Conduct, but the lawyer should also aid in securing observance of the Rules of Professional Conduct by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves.
> . . . .
>
> It is professional misconduct for a lawyer to . . . knowingly assist or induce another to . . . to violate the Rules of Professional Conduct . . . or do so through the acts of another.

Utah R. Prof. Conduct, Preamble & 8.4(a). Having represented State Farm as in-house counsel for over ten years, Spratley and Pearce unquestionably could not represent parties adverse to State Farm in matters that are substantially related to those in which Spratley and Pearce advised State Farm. See id. at 1.9(a). Nor could Spratley and Pearce use their privileged communications with State Farm in aid of other parties' claims against State Farm and its insureds. See id. at 1.9(b). Yet, by retaining Christensen & Jensen in this action, Spratley and Pearce are able to violate these duties through the acts of another.

factors, the principal concern of the courts has been to preserve the confidentiality of privileged communications. "In considering disqualification courts 'must be mindful that the interests of the clients are primary, and the interests of the lawyers are secondary.'" Richards v. Jain, 168 F. Supp.2d 1195, 1200 (W.D. Wash. 2001)(disqualifying counsel for improper access to opposing party's privileged information)(citations omitted). Accordingly, "any doubt is to be resolved in favor of disqualification." MMR/Wallace Power & Indust., Inc. v. Thames Assoc., 764 F. Supp. 712, 719 (D. Conn. 1991). Application of the Cade factors to this case demonstrates why the district court properly disqualified Christensen & Jensen.

B. Spratley and Pearce Possess Confidential and Privileged Information Pertaining to State Farm's Litigation Strategies

The first factor to be considered is whether the party disclosing information to the lawyer challenged for disqualification possesses confidential information pertaining to issues relevant to the suit in question. By an extension of reasoning, it would also be relevant that the party disclosing the information has confidential information relevant to other suits being handled by the lawyer against the same defendant.

Like all CLC attorneys, Spratley and Pearce routinely engaged in candid discussions with State Farm claims personnel regarding the handling of litigation against State Farm and its insureds. In the process of litigating dozens of cases, they necessarily discussed discovery strategy, potential defenses, the legal and factual merits of claims, settlement criteria, and trial strategy with State Farm claims personnel. All of these discussions were privileged and confidential. As State Farm's attorneys, Spratley and Pearce themselves generated privileged and confidential communications with the claims personnel named as defendants in this case, and with their colleagues. They also advised State Farm regarding legislative developments, coverage issues, and conflicts of interest between State Farm and its insureds. In this case, Spratley and Pearce predicate their claims on privileged communications with State Farm. As demonstrated in Part 4 of the

Facts, above, and Part IVA of this Argument, above, the communications offered by State Farm to support disqualification unquestionably (1) were directed to specific individuals; (2) relate primarily or exclusively to legal services; (3) concern specific aspects of litigation; and (4) were maintained in complete confidence until disclosed by plaintiffs in this case. (R. 633-74).[21]

In addition to privileged information pertinent to the claims asserted in this case, Spratley and Pearce possess privileged information relevant to other cases that Christensen & Jensen is currently prosecuting against State Farm and its insureds. State Farm's litigation strategy concerning trial, settlement, discovery, and expert witnesses disclosed in this case are relevant to other cases that Christensen & Jensen is prosecuting. For example, State Farm's litigation strategies and claims handling practices are at issue in the Mosier and Fidel cases, in which Christensen & Jensen is suing State Farm for bad faith. These cases challenge State Farm's excess judgment policies—the same policies that Spratley and Pearce have made part of this case.

But beyond strategy questions, Spratley and Pearce possess privileged information relating specifically to cases that Christensen & Jensen is currently prosecuting against State Farm. Notably, Mr. Spratley wrote a privileged memorandum to State Farm in March 1994 concerning the Campbell case, which also concerned allegations of bad faith by State Farm. In that memorandum, Mr. Spratley discussed his independent evaluation of the Campbell case and referenced his earlier review of the Campbell file. (R. 660-62). Mr. Spratley has now disclosed this memorandum to Christensen & Jensen—the attorneys representing the plaintiffs against State Farm in Campbell. (R. 690: Second Spratley Aff., ¶ 13 & Exh. 4).

[21] See also Addendum 4 to this brief, which provides specific information about some of the privileged communications disclosed by plaintiffs in this case.

The first prong of the Cade test is therefore unquestionably met. Spratley and Pearce possess privileged information critical in this case and others being litigated by Christensen & Jensen against State Farm and its insureds.

C. Spratley and Pearce Have Disclosed, and Will Continue Disclosing, State Farm's Confidential and Privileged Information to Christensen & Jensen

The second factor in Cade is "whether the disclosing party disclosed that information to opposing counsel." 956 P.2d at 1081. The privileged information appearing in exhibits to Spratley and Pearce's Complaint and affidavits have, of course, already been disclosed to Christensen & Jensen. In addition, Spratley and Pearce's Complaint contains allegations that hinge on confidential attorney-client communications. (R. 9-10, 13). In making these allegations, Christensen & Jensen could not have fulfilled their obligation to the court under Utah R. Civ. P. 11 without having investigated the confidential communications upon which these allegations are based. The allegations of the Complaint compel the conclusion that, unless they are restrained, Spratley and Pearce will continue disclosing privileged information to Christensen & Jensen.

Authorities considering similar cases have held that such disclosures should be presumed. See generally Utah R. Prof. Conduct 1.10, cmt. ("Preserving confidentiality is a question of access to information. Access to information, in turn, is essentially a question of fact in particular circumstances, aided by inferences, deductions or working presumptions that reasonably may be made about the way in which lawyers work together."). In a case with facts strikingly similar to this, the Second Circuit held that the court need not "'inquire whether the lawyer did, in fact, receive confidential information'. . . . The breach of confidence would not have to be proved; it is presumed." Hull v. Celanese Corp., 513 F.2d 568, 571 (2nd Cir. 1975) (citation omitted). In Hull, the court considered disqualification of counsel where "the in-house counsel for [the defendant] switched sides to become a plaintiff (rather than a lawyer) on the other side."

Id. The plaintiff's counsel represented a number of claimants in similar sexual harassment claims against the defendant, Celanese. See id. at 569. The plaintiffs' counsel sought to assert a similar claim on behalf of Delulio, Celanese's former in-house attorney. See id. Although she never entered an appearance for Celanese in any of the sexual harassment cases involving the plaintiffs' counsel, Delulio was nevertheless involved in such cases, obtaining information, attending meetings, and preparing and receiving memoranda. See id. at 570 & n.9. When the plaintiffs' counsel attempted to assert a sexual harassment claim on Delulio's behalf, Celanese moved to disqualify the plaintiffs' counsel. See id. at 569. The trial court granted Celanese's motion, ruling that Delulio possessed privileged and confidential information, and that disqualification was necessary to prevent "the on-going possibility for improper disclosure." Id. at 570.

The Second Circuit affirmed the trial court's disqualification of Delulio's lawyer, finding a presumption that Delulio divulged privileged information to her lawyer. See id. at 572. In support of this conclusion, the court noted that "[h]ad Delulio joined the [plaintiffs'] firm as an assistant counsel in the [plaintiffs'] case, they would have been disqualified. Here she joined them as a client. The relation is no less damaging and the presumption [of disclosure] should apply." Id. at 572. The Second Circuit held that, in this situation, "disqualification is 'a necessary and desirable remedy . . . to enforce the lawyer's duty of absolute fidelity and to guard against the danger of inadvertent use of confidential information.'" Id. at 571.

Like Delulio's involvement in the case against her employer, Mr. Spratley advised State Farm in the Campbell case without entering an appearance. (R. 660-62; R. 690: Second Spratley Aff., Exh. 4). Like Delulio, Mr. Spratley obtained information and prepared and received memoranda on a host of litigation issues. Meanwhile, Christensen & Jensen represents the plaintiffs against State Farm in the Campbell case and in other cases involving similar issues. Hull's logic is inescapable in this case: Had Spratley and Pearce joined Christensen & Jensen as counsel in the Campbell case (or other cases in

which they could use State Farm's confidences), Spratley and Pearce would have been disqualified. Here Spratley and Pearce joined Christensen & Jensen, as it were, as a client. Since the relation is no less damaging, the presumption of disclosure should apply.[22]

In a case almost identical to this case, the court followed the Hull rationale to disqualify an attorney retained by a former in-house attorney for an insurance company. In Prudential Insurance Co. v. Massaro, 2000 U.S. Dist. LEXIS 11985 (D. N.J. 2000), Massaro, a former in-house attorney for Prudential, retained an attorney, Miller, to represent him a dispute with Prudential. At that time, Miller represented claimants in disputes with Prudential involving similar issues, including a case on which Massaro had worked while at Prudential. See id. at **6-9. Prudential moved to disqualify Miller, asserting that "Miller had access to Prudential's confidential and privileged information by virtue of his representation of its former attorney, Massaro." Id. at **10-11.

In an unpublished decision, a magistrate judge recommended that Miller be disqualified, and a district court judge adopted this recommendation. The court noted that "[r]ather than an attorney who has switched sides," the disqualification motion "involves an attorney who has become the client of counsel for the other side." See In re Prudential Insurance Company of America Sales Practice Litigation, Case No. 954704, REPORT AND RECOMMENDATION, filed February 20, 1997, at 24.[23] The court concluded

[22] Other courts agree that there need not be proof of actual disclosure of confidential information when the circumstances make it a reasonable inference. "[T]he court need not 'inquire whether the lawyer did, in fact, receive confidential information'. . . . the possibility that breach of these confidences was committed . . . is sufficient to make disqualification a necessary and desirable remedy." NCK Organization, Ltd. v. Bregman, 542 F.2d 128, 134 (2nd Cir. 1976) (citation omitted). In situations like that posed by this case, "a presumption arises that confidences have been imparted" by former employee to his counsel in pursuing claim against his former employer. Williams v. TWA, 588 F. Supp. 1037, 1043 (D. Mo. 1984).

[23] Copies of the magistrate judge's Report and Recommendations and the district court's Opinion adopting the Report and Recommendations are attached as Addendum 3.

that "[t]he attorney need not have actually divulged client confidences to the other side in order to be disqualified. Actual disclosure is not the test; rather the test is whether there is a risk that confidential information has been used unfairly," and that "[a]ny doubts must be resolved in favor of disqualification." See id. at 23-24. The court found that "if Massaro felt the need to seek legal advice" in his disputes with Prudential, "Miller was not among the attorneys practicing in this country eligible to provide that advice." Id. at 28. Likewise, if Spratley and Pearce feel the need to pursue their claims against State Farm, Christensen & Jensen is not among the law firms eligible to represent them.

An additional factor compelled disqualification Given all the facts, it is reasonable to assume that Spratley and Pearce will continue disclosing State Farm's confidences to Christensen & Jensen, and that no preventative measures will be capable of curing the consequences. This factor should weigh in favor of disqualification. "No person is immune from the spread of infection by reason of his good conduct or pure heart." Goldenberg v. Corporate Air, Inc., 457 A.2d 296, 301 (Conn. 1983) (disqualifying counsel notwithstanding counsel's proper conduct). "'[E]ven the most rigorous self-discipline might not prevent a lawyer from unconsciously using or manipulating a confidence acquired in an earlier representation and transforming it into a telling advantage in the subsequent litigation.'" MMR/Wallace Power & Industrial, Inc. v. Thames Assoc., 764 F. Supp. 712, 719 (D. Conn. 1991) (citation omitted). See also Hull, 513 F.2d at 572. "To believe [the disclosing party] did not and will not remember and ultimately use that information, even 'subliminally,' defies common sense and human nature." Cordy v. Sherwin-Williams Co., 156 F.R.D. 584 (D. N.J. 1994). Christensen & Jensen is engaged in a range of litigation against State Farm, much of which involves issues at the core of Spratley and Pearce's suit, and much of which involves issues about which Spratley and Pearce necessarily have confidential or privileged information due to their more than ten years service with State Farm. It is hard to imagine a situation more likely to produce continued breaches of confidentiality to the

detriment of State Farm and more likely to make a mockery of the confidential relations between lawyers and their clients.

The second prong of the Cade test is met. Spratley and Pearce have disclosed privileged information to Christensen & Jensen and likely will do so in the future.

D. Christensen & Jensen's Continued Representation Threatens to Taint all Further Proceedings in this Case

The third Cade factor is "whether, in light of such disclosure, opposing counsel's 'continued representation . . . threatens to "taint" all further proceedings in this case.' " 956 P.2d at 1081. Since the Complaint cannot be proven without resort to confidential and/or privileged information, Christensen & Jensen's continued representation of Spratley and Pearce will inevitably taint all further proceedings in this case. Beyond that, Messrs. Spratley and Pearce are now in the business of suing State Farm. In a website designed to attract clients and referrals they advertised their inside knowledge of State Farm's practices—knowledge gained as "the top two in-house attorneys for State Farm Insurance in Utah." They offered to provide State Farm's adversaries with "their keen and fresh insights into the inner workings of State Farm." (R. 264-65). Spratley and Pearce's insights into State Farm's workings are "keen and fresh" because these insights derive from confidential or privileged information.

They have now passed some of their "insights" to Christensen & Jensen. They have turned this case into an indirect vehicle for Christensen & Jensen's discovery privileged information of use in other cases—compromising the integrity of these proceedings, as well as those. In these other cases, Christensen & Jensen will have the benefit of Spratley and Pearce's knowledge gained from privileged communications. For example, in Mosier ex rel Lone Tree Services, Inc. v. State Farm, Christensen & Jensen challenges State Farm's litigation of claims, including allegations that State Farm unreasonably refused to settle claims. In Fidel v. State Farm, Christensen & Jensen has filed memoranda with the court asserting contentions that directly involve the

relationship between State Farm's claims practices and its litigation practices. The firm contends on plaintiff's behalf that that State Farm's counsel acted improperly and in bad faith in relation to the arbitration of an underinsured motorist claim. In a direct parallel with an important issue in this case, Christensen & Jensen also challenges State Farm's "peace of mind" policy in handling excess verdict claims. In the Green case, Christensen & Jensen has requested both documentary and oral discovery from State Farm's counsel regarding claims practices. Although State Farm has so far been able to restrict Christensen & Jensen's ability to obtain such information through protective measures, Messrs. Spratley and Pearce provide Christensen & Jensen with a means of circumventing such restrictions.

The case law presents analogous situations in which courts have found the potential for "taint" sufficient to require disqualification. In Williams v. TWA, 588 F. Supp. 1037, 1043 (D. Mo. 1984), a plaintiff brought a discrimination claim against his former employer, TWA. The plaintiff retained counsel who also represented other parties in a separate discrimination claim against TWA. In this other discrimination claim, the former employee had assisted TWA's counsel and had been privy to confidential lawyer-client communications. See id. at 1039. While employed with TWA, the former employee prepared "a frank and candid analysis" of the discrimination claim against TWA. Id. When TWA discovered that, in pursuing her own discrimination claim, the former employee had retained an attorney who was representing plaintiffs adverse to TWA in another discrimination claim, TWA moved to disqualify the plaintiffs' counsel. See id. at 1040. In granting this motion, the court concluded that the plaintiff's counsel's representation of the former employee threatened to taint the entire proceeding:

> [T]he potential for unfair discovery of information through private consultation rather than through normal discovery procedures threatens the integrity of the trial process. . . . A reasonable member of the public or of the bar would share . . . the nagging suspicion that plaintiffs' trial preparation and presentation of their cases had benefited from confidential

> information . . . . All further proceedings in this case, including any trial, would be tainted by this reasonable suspicion.

Id. at 1045.

Under similar circumstances, the court in MMR/Wallace Power & Industrial, Inc. v. Thames Assoc., 764 F. Supp. 712 (D. Conn. 1991), disqualified an attorney due to his improper access to the opposing party's confidences. In representing the defendant, the disqualified attorney consulted with Richard Willett, a former employee of the plaintiff, MMR. Before leaving MMR, Willet had assisted its attorneys in litigation against the defendant and "prepared a number of reports and analyses . . . attended and participated in a number of confidential meetings with [MMR's] counsel to discuss litigation tactics and strategies." Id. The defendant's counsel became aware of Willett's role in the case when MMR designated Willett as a potential witness. See id. at 715 nn. 2-3. When MMR moved to disqualify the defendant's counsel, the court ruled that his continued representation "threatens to taint the integrity of this case because the confidential information he presumably received from Willett creates at least an appearance that defendant has obtained an unfair advantage at trial." Id. at 727. The court noted that "[e]ven if, as defendant maintains, no confidential information was actually disclosed, [disqualified counsel's] alliance with Willett creates a 'nagging suspicion' that [the defendant's] preparation and presentation has already been unfairly benefited." Id. "While the court is concerned about interfering with [the] right to freely select counsel of its choice, that concern is outweighed by MMR's interest in a trial free from the risk that confidential information has been used against it . . ." Id. at 728.[24]

The present case presents more than a "nagging suspicion" that Christensen & Jensen's presentation of this and other cases will be "unfairly benefited" by confidential and/or privileged information improperly disclosed to them; it presents the real potential

[24] The Utah Court of Appeals relied on the MMR case in articulating disqualification standards in Cade v. Zions First Nat'l Bank, 956 P.2d 1073, 1076 (Utah Ct. App. 1991).

for subversion of the litigation process in a number of cases. Disqualification is the only appropriate remedy.

Messrs. Spratley and Pearce rely on Fox Searchlight Pictures, Inc. v. Paladino, 89 Cal.App.4th 294 (2001), a case in which Fox, the employer, moved to disqualify the attorneys retained by its employee, Paladino, "on the grounds they had previously represented Fox and they had a conflict of interest with their current client, Paladino." Id. at 300. To support this claim, Fox offered a series of hypotheticals under which conflicts of interest might arise, which the court rejected. See id. at 302. In the present case, by contrast, State Farm does not claim that disqualification is necessary due to a conflict of interest, real or hypothetical. Rather, disqualification is necessary because Christensen & Jensen has obtained improper access to privileged information that Christensen & Jensen can use to State Farm's disadvantage in this and other cases.

Although denying disqualification, the Paladino court cautioned that the risk of disclosure of privileged information is a key concern in addressing the propriety of an in-house counsel's suit against her former employer. See 89 Cal.App.4th 309. Unlike Christensen & Jensen, Paladino's attorneys were not simultaneously pursuing other claims against Fox. Spratley and Pearce's claims guarantee the disclosure of privileged information, and their choice of counsel maximizes the risk of prejudice to State Farm in the making of such disclosures.

Finally, Paladino was an intermediate appellate court's interpretation of principles announced by the California Supreme Court in General Dynamics Corp. v. Superior Court, 876 P.2d 487 (Cal. 1994). These principles remain intact: in-house counsel may only pursue a claim against their employer "provided it can be established without breaching the attorney-client privilege or unduly endangering the values lying at the heart of the professional relationship." Id. at 490. When such a claim "cannot, for reasons peculiar to the particular case, be fully established without breaching the attorney-client

privilege, the suit must be dismissed in the interest of preserving the privilege." Id. at 503-04.

It is significant that Spratley and Pearce do not attempt to distinguish the case most comparable to this case—Prudential Insurance Co. v. Massaro, 2000 U.S. Dist. LEXIS 11985 (D. N.J. 2000), aff'd, 2002 U.S. App. LEXIS 14560 (3rd Cir. July 18, 2002). As in this case, Massaro "involve[d] an attorney who [became] the client of counsel for the other side." (R. 584, 607). The court held that disqualified counsel's access to the opposing party's confidential and privileged information tainted the proceedings. See 2000 U.S. Dist. LEXIS 11985 **10-11. We respectfully submit that this court should reach the same conclusion here.

CONCLUSION

The district court's Order imposed a necessary set of ground rules to protect privileged and other protected information. The Order was necessary because Messrs. Spratley and Pearce removed confidential records when they left State Farm's employment, then disclosed the records in violation of their duties, claiming all the while that they are exempt from the normal rules that lawyers are bound to follow. The Order prevents further violations of attorney-client confidences in this unusual case. The Order also correctly recognized that disqualifying Christensen & Jensen is the only means of ensuring that this case did not turn into an illicit discovery mechanism in other cases.

Nothing in the Order prevents the plaintiffs from seeking discovery of information from State Farm or the other defendants in the ordinary course of litigation under the Utah Rules of Civil Procedure. It only prevents further misuse of confidential and/or privileged information, and takes steps to remedy those abuses.

The Order should be affirmed.

DATED this 3rd day of September, 2002.

Snell & Wilmer

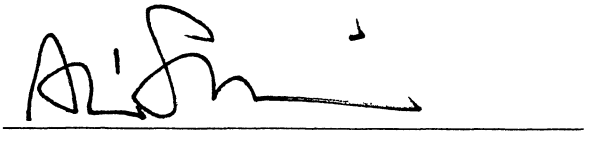
Alan L. Sullivan
Scott C. Sandberg
Attorneys for Respondents

CERTIFICATE OF MAILING

I hereby certify that on this 3rd day of September 2002, I caused to be mailed, postage prepaid, a true and accurate copy of the foregoing to the following:

L. Rich Humpherys
Karra J. Porter
Christensen & Jensen, P.C.
50 South Main Street, Suite 1500
Salt Lake City, UT 84144

Richard K. Spratley
Brett G. Pearce
1218 West South Jordan Parkway, Suite B
South Jordan, UT 84095



INDEX OF ADDENDA

1. Minute Entry entered December 7, 2001, by Honorable Dennis Frederick, District Court Judge, in Spratley et al. v. State Farm Mutual Automobile Insurance Company et al., Case No. 010904770, Third Judicial District Court for Salt Lake County, State of Utah.

2. Determinative Law

   A. Rule 504, Utah Rules of Evidence

   B. Rule 507, Utah Rules of Evidence

   C. Rule 26(c), Utah Rules of Civil Procedure

   D. Rule 1.6, Utah Rules of Professional Conduct

   E. Preamble, Utah Rules of Professional Conduct

   F. Utah Code Ann. § 78-24-8(2)

3. In re Prudential Insurance Company of America Sales Practice Litigation, Case No. 954704, REPORT AND RECOMMENDATION, filed February 20, 1997

4. Disclosed Documents

Tab 1

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

RICHARD K. SPRATLEY and BRETT G. PEARCE, Plaintiffs, vs. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, MICHAEL ARNOLD, CRAIG KINGMAN, SCOTT D. KOTTER and HAROLD E. NIXON, Defendants.	MINUTE ENTRY Case No. 010904770 Honorable J. Dennis Frederick Court Clerk: Cindy Beverly December 7, 2001
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Counterclaim Plaintiff, vs. RICHARD K. SPRATLEY and BRETT G. PEARCE, Counterclaim Defendants.	

This matter comes before the Court pursuant to State Farm's Motion for Preliminary Injunction and Protective Order, Motion to Disqualify, and Motion to Strike Cohen Affidavit. The Court heard oral argument with respect to the motions on December 3, 2001. Following the hearing, the matters were taken under advisement.

The Court having considered the motions, memoranda, exhibits attached thereto and for the good cause shown hereby enters the following ruling.

Turning first to State Farm's Motion for Preliminary Injunction and Protective Order, after reviewing the relevant case law, it is clear the majority of jurisdictions hold an attorney hired by an insurance company to defend its insured represents the insurer, absent any conflict of interest, in something akin to "dual client status." In the instant case, both Richard Spratley and Brett Pearce were hired to provide legal services for State Farm and State Farm insureds. Indeed, they were, in effect, in-house counsel. While neither side disputes that the primary duty, when an attorney is hired to provide a defense under an insurance policy, is to the insured, the Court finds, and the case law supports, that such does not necessarily limit the ability of the insurer to assert attorney-client privilege.

Based upon the forgoing, Messrs. Spratley and Pearce are ordered to:

(1) Refrain from disclosing (in this litigation or otherwise) confidential communications and information exchanged between Spratley or Pearce on one hand, and State Farm and/or its insureds on the other hand, relating to the provision of legal services by Spratley, Pearce or other lawyers for State Farm, or made for the purpose of facilitating such legal services;

(2) Refrain from disclosing any facts relating to Spratley or Pearce's representation of State Farm's insureds, absent express consent to disclosure by the insureds; and

(3) Return to State Farm all confidential documents materials, and information that Spratley and Pearce created, maintained, or acquired as part of their employment with State Farm, and that are currently in their possession.

With respect to State Farm's Motion to Disqualify:

> In deciding a motion to disqualify for breach of confidentiality, courts have considered: (1) whether the disclosing party had "confidential or privileged information pertaining to [the movant's] trial preparation and strategy"; (2) whether the disclosing party disclosed that information to opposing counsel; and (3) whether, in light of such disclosure, opposing counsel's "continued representation . . . threatens to 'taint' all further proceedings in this case."

Cade v. Zions First Nat'l Bank, 956 P.2d 1073, 1081 (Utah Ct. App. 1991)(internal citations omitted).

Applying the aforementioned to the facts of this case, it is uncontroverted plaintiffs' role while at State Farm was to act as legal counsel advising State Farm directly and representing State Farm's insureds. Moreover, inherent in such an attorney-client relationship is engaging in confidential communications as to litigations strategies. In sum, plaintiffs acted as lawyers, and in that capacity engaged in confidential communications, thus satisfying the first element of Cade.

As to the remaining elements, it is undisputed plaintiffs have already divulged privileged information concerning State Farm's litigations strategies to Mr. Humphreys and his firm. Furthermore, additional disclosure seems a virtual certainty as such is necessary to support their allegations. Finally, the Court is persuaded that under the circumstances, these continued disclosures threaten to taint all further proceedings in this case.

In sum, while motions to disqualify are to be viewed with extreme caution, because privileged communications are the centerpiece of this case, the Court is of the opinion disqualification, as requested by defendants, is appropriate.

Finally, with respect to the Cohen Affidavit, the Court finds such lacks foundation and offers impermissible legal opinions. Accordingly, the affidavit is stricken.

This Minute Entry constitutes the Order regarding the matters addressed herein. No further order is required.

DATED this 7th day of December, 2001.

J. DENNIS FREDERICK
DISTRICT COURT JUDGE

SALT LAKE COUNTY · SALT LAKE CITY · STATE OF UTAH · DISTRICT COURT

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 010904770 by the method and on the date specified.

METHOD	NAME
Mail	L. RICH HUMPHREYS ATTORNEY PLA 50 South Main, Suite 1500 SALT LAKE CITY, UT 84144
Mail	KARRA J PORTER ATTORNEY PLA 50 South Main Street SUITE 1500 SALT LAKE CITY UT 84144
Mail	SCOTT SANDBERG ATTORNEY DEF 15 WEST SOUTH TEMPLE #1200 Salt Lake City UT 84101
Mail	ALAN L. SULLIVAN ATTORNEY DEF 15 West South Temple #1200 Gateway Tower West SALT LAKE CITY UT 84101

Dated this 7th day of Dec., 2001.

C. Beverley
Deputy Court Clerk

Tab 2

Exhibit A

WEST'S UTAH RULES OF COURT
UTAH RULES OF EVIDENCE
ARTICLE V. PRIVILEGES

Current with amendments received through 3-15-2002.

RULE 504. LAWYER-CLIENT

(a) Definitions. As used in this rule:

(1) A "client" is a person, including a public officer, or corporation, association, or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services.

(2) A "lawyer" is a person authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation.

(3) A "representative of the lawyer" is one employed to assist the lawyer in a rendition of professional legal services.

(4) A "representative of the client" is one having authority to obtain professional legal services, or to act on advice rendered pursuant thereto, on behalf of the client, or one specifically authorized to communicate with the lawyer concerning a legal matter.

(5) A "communication" includes advice given by the lawyer in the course of representing the client and includes disclosures of the client and the client's representatives to the lawyer or the lawyer's representative incidental to the professional relationship.

(6) A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission ofthe communication.

(b) General Rule of Privilege. A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client between the client and the client's representatives, lawyers, lawyer's representatives, and lawyers representing others in matters of common interest, and among the client's representatives, lawyers, lawyer's representatives, and lawyers representing others in matters of common interest, in any combination.

(c) Who May Claim the Privilege. The privilege may be claimed by the client, the client's guardian or conservator, the personal representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence. The person who was the lawyer at the time of the communication is presumed to have authority to claim the privilege on behalf of the client.

(d) Exceptions. No privilege exists under this rule:

(1) Furtherance of Crime or Fraud. If the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud; or

(2) Claimants Through Same Deceased Client. As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction; or

(3) Breach of Duty by Lawyer or Client. As to a communication relevant to an issue of breach of duty by the lawyer to the client or by the client to the lawyer; or

(4) Document Attested by Lawyer. As to a communication relevant to an issue concerning a document to which the lawyer is an attesting witness; or

(5) Joint Clients. As to a communication relevant to a matter of common interest between two or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between any of the clients.

Advisory Committee Note

Rule 504 is based upon proposed Rule 503 of the United States Supreme Court. Rule 504 would replace and supersede Utah Code Ann. § 78-24-8(2) and is intended to be consistent with the ethical obligations of confidentiality set forth in Rule 1.6 of the Utah Rules of Professional Conduct.

The Committee revised the proposed rule of the United States Supreme Court to address the issues raised in Upjohn Co. v. United States, 449 U.S. 383, 101 S.Ct. 677 (1981), as to when communications involving representatives of a corporation are protected by the privilege. The Committee rejected limiting the privilege to members of the "control group" and added as subparagraph (a)(4) a definition for "representative of the client" that includes within the privilege disclosures not only of the client and the

client's formal spokesperson, but also employees who are specifically authorized to communicate to the lawyer concerning a legal matter. The word "specifically" is intended to preclude a general authorization from the client for the client's employees to communicate under the cloak of the privilege, but is intended to allow the client, as related to a specific matter, to authorize the client's employees as "representatives" to disclose information to the lawyer as to that specific matter with confidence that the disclosures will remain within the lawyer-client privilege.

A "representative" of the lawyer need not be directly paid by thelawyer as long as the representative meets the requirement of being engaged to assist the lawyer in providing legal services. Thus, a person paid directly by the client but working under the control and direction of the lawyer for the purposes of providing legal services satisfies the requirements of subparagraph (a)(3). Similarly, a representative of the client who may be an independent contractor, such as an independent accountant, consultant or person providing other services, is a representative of the client for purposes of subparagraph (a)(5) if such person has been engaged to provide services reasonably related to the subject matter of the legal services or whose service is necessary to provide such service.

The client is entitled not only to refuse to disclose the confidential communication, but also to prevent disclosure by the lawyer or others who were involved in the conference or learned, without the knowledge of the client, the content of the confidential communication. Problems of waiver are dealt with by Rule 507.

Under subparagraph (b) communications among the various people involved in the legal matter, relating to the providing of legal services, are all privileged, except for communications between clients. Those are privileged only if they are part of a conference with others involved in legal services.

Subparagraph (c) allows the "successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence" to claim the privilege. Where there is a dispute as to which of several persons has claims to the rights of a previously existing entity, the court will be required to determine from the facts which entity's claim is most consistent with the purposes of this rule.

The Committee considered and rejected an exception to the rule for communications in furtherance of a tort. Disallowing the privilege where the lawyer's services are sought in furtherance of a crime or fraud is consistent with the trend in other states. The Committee considered extending the exception to include "intentional torts," but concluded that because of the broad range of conduct that may be found to be an intentional tort, such an exception would create undesirable ambiguities and uncertainties as to when

the privilege applies.

The Committee felt that exceptions to the privilege should be specifically enumerated, and further endorsed the concept that in the area of exceptions, the rule should simply state that no privilege existed, rather than expressing the exception in terms of a "waiver" of the privilege. The Committee wanted to avoid any possible clashes with the common law concepts of "waiver."

Exhibit B

WEST'S UTAH RULES OF COURT
UTAH RULES OF EVIDENCE
ARTICLE V. PRIVILEGES

Current with amendments received through 3-15-2002.

RULE 507. MISCELLANEOUS MATTERS

(a) A person upon whom these rules confer a privilege against disclosure of the confidential matter or communication waives the privilege if the person or a predecessor while holder of the privilege voluntarily discloses or consents to the disclosure of any significant part of the matter or communication, or fails to take reasonable precautions against inadvertent disclosure. This rule does not apply if the disclosure is itself a privileged communication.

(b) Evidence of a statement or other disclosure of privileged matter is not admissible against the holder of the privilege if disclosure was

(1) compelled erroneously or

(2) made without opportunity to claim the privilege.

(c)(1) Comment or Inference Not Permitted. The claim of privilege, whether in the present proceeding or upon a prior occasion, is not a proper subject of comment by judge or counsel. No inference may be drawn therefrom.

(2) Claiming Privilege Without Knowledge of Jury. In jury cases, proceedings shall be conducted, to the extent practicable, so as to facilitate the making of claims of privilege without the knowledge of the jury.

(3) Jury Instruction. Upon request, any party against whom the jury might draw an adverse inference from the claim of privilege is entitled to instruction that no inference may be drawn therefrom.

(4) Exception. In a civil action, the provisions of subparagraph (c) do not apply when the privilege against self-incrimination has been invoked.

Advisory Committee Note

The subject matter of Rule 507 was previously included in Utah Rules of Evidence 37, 38, 39 and 40. The language recommended by the Committee, however, is largely that of proposed Federal Rules 511, 512 and 513, rules not included among those adopted by Congress.

Proposed Federal Rule 511 became Rule 507(a), replacing Rule 37. Proposed Federal Rule 512 became Rule 507(b), replacing Rule 38. Proposed Federal Rule 513 became Rule 507(c), replacing Rule 39. No replacement was adopted for Rule 40 since the Committee determined that the subject matter of that rule need not be covered by a rule of evidence.

Subparagraph (a). Since the purpose of evidentiary privileges is the protection of some societal interest or confidential relationship, the privilege should end when the purpose is no longer served because the holder of the privilege has allowed disclosure or made disclosure. For the same reason, although Rule 37 required a knowing waiver of the privilege, Rule 507(a) as drafted does not require such knowledge. A stranger to the communication may testify to an otherwise privileged communication, if the participants have failed to take reasonable precautions to preserve privacy.

Subparagraph (b). Once disclosure of privileged matter has occurred, although confidentiality cannot be restored, the purpose of the privilege may still be served in some instances by preventing use of the evidence against the holder of the privilege. For that reason, privileged matter may still be excluded when the disclosure was not voluntary or was made without an opportunity to claim the privilege.

Subparagraph (c).

(1) Allowing inferences to be drawn from the invocation of a privilege might undermine the interest or relationship the privilege was designed to protect.

(2) For the same reason, the invocation of a privilege should not be revealed to the jury. Doing so might also result in unwarranted emphasis on the exclusion of the privileged matter.

(3) Whether to seek an instruction is left to the judgment of counsel for the party against whom the inference might be drawn. If requested, such an instruction is a matter of right.

(4) The provisions of subparagraph (c)(4) are not intended to alter the

common law rules as to inferences that may be drawn or as to when a party may comment or be entitled to a jury instruction when the privilege has been invoked.

Exhibit C

WEST'S UTAH RULES OF COURT
UTAH RULES OF CIVIL PROCEDURE
PART V. DEPOSITIONS AND DISCOVERY

Current with amendments received through 3-15-2002.

RULE 26. GENERAL PROVISIONS GOVERNING DISCOVERY

(a) Required disclosures; Discovery methods.

(1) Initial disclosures. Except in cases exempt under subdivision (a)(2) and except as otherwise stipulated or directed by order, a party shall, without awaiting a discovery request, provide to other parties:

(A) the name and, if known, the address and telephone number of each individual likely to have discoverable information supporting its claims or defenses, unless solely for impeachment, identifying the subjects of the information;

(B) a copy of, or a description by category and location of, all discoverable documents, data compilations, and tangible things in the possession, custody, or control of the party supporting its claims or defenses, unless solely for impeachment;

(C) a computation of any category of damages claimed by the disclosing party, making available for inspection and copying as under Rule 34 all discoverable documents or other evidentiary material on which such computation is based, including materials bearing on the nature and extent of injuries suffered; and

(D) for inspection and copying as under Rule 34 any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the case or to indemnify or reimburse for payments made to satisfy the judgment.

Unless otherwise stipulated by the parties or ordered by the court, the disclosures required by subdivision (a)(1) shall be made within 14 days after the meeting of the parties under subdivision (f). Unless otherwise stipulated by the parties or ordered by the court, a party joined after the meeting of the parties shall make these disclosures within 30 days after being served. A party shall make initial disclosures based on the information then reasonably available and is not excused from making disclosures because the party has not fully completed the investigation of the case or because the party challenges

the sufficiency of another party's disclosures or because another party has not made disclosures.

(2) Exemptions.

(A) The requirements of subdivision (a)(1) and subdivision (f) do not apply to actions:

(i) based on contract in which the amount demanded in the pleadings is $20,000 or less;

(ii) for judicial review of adjudicative proceedings or rule making proceedings of an administrative agency;

(iii) governed by Rule 65B or Rule 65C;

(iv) to enforce an arbitration award;

(v) for water rights general adjudication under Title 73, Chapter 4; and

(vi) in which any party not admitted to the practice law in Utah is not represented by counsel.

(B) In an exempt action, the matters subject to disclosure under subpart (a)(1) are subject to discovery under subpart (b).

(3) Disclosure of expert testimony.

(A) A party shall disclose to other parties the identity of any person who may be used at trial to present evidence under Rules 702, 703, or 705 of the Utah Rules of Evidence.

(B) Unless otherwise stipulated by the parties or ordered by the court, this disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness or party. The report shall contain the subject matter on which the expert is expected to testify; the substance of the facts and opinions to which the expert is expected to testify; a summary of the grounds for each opinion; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

(C) Unless otherwise stipulated by the parties or ordered by the court, the disclosures required by subdivision (a)(3) shall be made within 30 days after the expiration of fact discovery as provided by subdivision (d) or, if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under paragraph (3)(B), within 60 days after the disclosure made by the other party.

(4) Pretrial disclosures. A party shall provide to other parties the following information regarding the evidence that it may present at trial other than solely for impeachment:

(A) the name and, if not previously provided, the address and telephone number of each witness, separately identifying witnesses the party expects to present and witnesses the party may call if the need arises;

(B) the designation of witnesses whose testimony is expected to be presented by means of a deposition and, if not taken stenographically, a transcript of the pertinent portions of the deposition testimony; and

(C) an appropriate identification of each document or other exhibit, including summaries of other evidence, separately identifying those which the party expects to offer and those which the party may offer if the need arises.

Unless otherwise stipulated by the parties or ordered by the court, the disclosures required by subdivision (a)(4) shall be made at least 30 days before trial. Within 14 days thereafter, unless a different time is specified by the court, a party may serve and file a list disclosing (i) any objections to the use under Rule 32(a) of a deposition designated by another party under subparagraph (B) and (ii) any objection, together with the grounds therefor, that may be made to the admissibility of materials identified under subparagraph (C). Objections not so disclosed, other than objections under Rules 402 and 403 of the Utah Rules of Evidence, shall be deemed waived unless excused by the court for good cause shown.

(5) Form of disclosures. Unless otherwise stipulated by the parties or ordered by the court, all disclosures under paragraphs (1), (3) and (4) shall be made in writing, signed and served.

(6) Methods to discover additional matter. Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission.

(b) Discovery scope and limits. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) In general. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(2) Limitations. The frequency or extent of use of the discovery methods set forth in Subdivision (a)(6) shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation. The court may act upon its own initiative after reasonable notice or pursuant to a motion under Subdivision (c).

(3) Trial preparation: Materials. Subject to the provisions of Subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under Subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the

motion For purposes of this paragraph, a statement previously made is (A) a written statement signed or otherwise adopted or approved by the person making it, or (B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded

(4) Trial preparation Experts

(A) A party may depose any person who has been identified as an expert whose opinions may be presented at trial If a report is required under subdivision (a)(3)(B), any deposition shall be conducted within 60 days after the report is provided

(B) A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(C) Unless manifest injustice would result,

(i) The courtshall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under Subdivision (b)(4) of this rule, and

(ii) With respect to discovery obtained under Subdivision (b)(4)(A) of this rule the court may require, and with respect to discovery obtained under Subdivision (b)(4)(B) of this rule the court shall require, the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert

(c) Protective orders. Upon motion by a party or by the person from whom discovery is sought, accompanied by a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following

(1) that the discovery not be had,

(2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place;

(3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;

(4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;

(5) that discovery be conducted with no one present except persons designated by the court;

(6) that a deposition after being sealed be opened only by order of the court;

(7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way;

(8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(d) Sequence and timing of discovery. Except for cases exempt under subdivision (a)(2), except as authorized under these rules, or unless otherwise stipulated by the parties or ordered by the court, a party may not seek discovery from any source before the parties have met and conferred as required by subdivision (f). Unless otherwise stipulated by the parties or ordered by the court, fact discovery shall be completed within 240 days after the first answer is filed. Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

(e) Supplementation of responses. A party who has made a disclosure under subdivision (a) or responded to a request for discovery with a response is under a duty to supplement the disclosure or response to include information thereafter acquired if ordered by the court or in the following circumstances:

(1) A party is under a duty to supplement at appropriate intervals disclosures under subdivision (a) if the party learns that in some material

respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing. With respect to testimony of an expert from whom a report is required under subdivision (a)(3)(B) the duty extends both to information contained in the report and to information provided through a deposition ofthe expert.

(2) A party is under a duty seasonably to amend a prior response to an interrogatory, request for production, or request for admission if the party learns that the response is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.

(f) Discovery and scheduling conference.

The following applies to all cases not exempt under subdivision (a)(2), except as otherwise stipulated or directed by order.

(1) The parties shall, as soon as practicable after commencement of the action, meet in person or by telephone to discuss the nature and basis of their claims and defenses, to discuss the possibilities for settlement of the action, to make or arrange for the disclosures required by subdivision (a)(1), and to develop a stipulated discovery plan. Plaintiff's counsel shall schedule the meeting. The attorneys of record shall be present at the meeting and shall attempt in good faith to agree upon the discovery plan.

(2) The plan shall include:

(A) what changes should be made in the timing, form, or requirement for disclosures under subdivision (a), including a statement as to when disclosures under subdivision (a)(1) were made or will be made;

(B) the subjects on which discovery may be needed, when discovery should be completed, whether discovery should be conducted in phases and whether discovery should be limited to particular issues;

(C) what changes should be made in the limitations on discovery imposed under these rules, and what other limitations should be imposed; and

(D) any other orders that should be entered by the court.

(3) Plaintiff's counsel shall submit to the court within 14 days after the meeting and in any event no more than 60 days after the first answer is filed a proposed form of order in conformity with the parties' stipulated discovery plan. The proposed form of order shall also include each of the subjects listed in Rule 16(b)(1)-(6), except that the date or dates for pretrial conferences,

final pretrial conference and trial shall be scheduled with the court or may be deferred until the close of discovery. If the parties are unable to agree to the terms of a discovery plan or any part thereof, the plaintiff shall and any party may move the court for entry of a discovery order on any topic on which the parties are unable to agree. Unless otherwise ordered by the court, the presumptions established by these rules shall govern any subject not included within the parties' stipulated discovery plan.

(4) Any party may request a scheduling and management conference or order under Rule 16(b).

(5) A party joined after the meeting of the parties is bound by the stipulated discovery plan and discovery order, unless the court orders on stipulation or motion a modification of the discovery plan and order. The stipulation or motion shall be filed within a reasonable time after joinder.

(g) Signing of discovery requests, responses, and objections. Every request for discovery or response or objection thereto made by a party shall be signed by at least one attorney of record or by the party if the party is not represented, whose address shall be stated. The signature of the attorney or party constitutes a certification that the person has read the request, response, or objection and that to the best of the person's knowledge, information, and belief formed after reasonable inquiry it is: (1) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; (2) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (3) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation. If a request, response, or objection is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party making the request, response, or objection, and a party shall not be obligated to take any action with respect to it until it is signed.

If a certification is made in violation of the rule, the court, upon motion or upon its own initiative, shall impose upon the person who made the certification, the party on whose behalf the request, response, or objection is made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney fee.

(h) Deposition where action pending in another state. Any party to an action or proceeding in another state may take the deposition of any person within this state, in the same manner and subject to the same conditions and limitations as if such action or proceeding were pending in this state,

provided that in order to obtain a subpoena the notice of the taking of such deposition shall be filed with the clerk of the court of the county in which the person whose deposition is to be taken resides or is to be served, and provided further that all matters arising during the taking of such deposition which by the rules are required to be submitted to the court shall be submitted to the court in the county where the deposition is being taken.

(i) Filing.

(1) Unless otherwise ordered by the court, a party shall not file disclosures or requests for discovery with the court, but shall file only the original certificate of service stating that the disclosures or requests for discovery have been served on the other parties and the date of service. Unless otherwise ordered by the court, a party shall not file a response to a request for discovery with the court, but shall file only the original certificate of service stating that the response has been served on the other parties and the date of service. Except as provided in Rule 30(f)(1), Rule 32 or unless otherwise ordered by the court, depositions shall not be filed with the court.

(2) A party filing a motion under subdivision (c) or a motion under Rule 37(a) shall attach to the motion a copy of the request for discovery or the response which is at issue.

[Amended November 1, 1999; April 1, 2000; November 1, 2000.]

Exhibit D

WEST'S UTAH RULES OF COURT
UTAH CODE OF JUDICIAL ADMINISTRATION
PART II. SUPREME COURT RULES OF PROFESSIONAL PRACTICE
CHAPTER 13. RULES OF PROFESSIONAL CONDUCT
CLIENT-LAWYER RELATIONSHIP

Current with amendments received through 3-15-2002.

RULE 1.6 CONFIDENTIALITY OF INFORMATION

(a) A lawyer shall not reveal information relating to representation of a client except as stated in paragraph (b), unless the client consents after consultation.

(b) A lawyer may reveal such information to the extent the lawyer believes necessary:

(1) To prevent the client from committing a criminal or fraudulent act that the lawyer believes is likely to result in death or substantial bodily harm, or substantial injury to the financial interest or property of another;

(2) To rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services had been used;

(3) To establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client or to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved; or

(4) To comply with the Rules of Professional Conduct or other law.

(c) Representation of a client includes counseling a lawyer(s) about the need for or availability of treatment for substance abuse or psychological or emotional problems by members of the Utah State Bar serving on the Lawyers Helping Lawyers Committee.

Comment

A fundamental principle in the client-lawyer relationship is that the lawyer maintain confidentiality of information relating to the representation. The client is thereby encouraged to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter.

The principle of confidentiality is given effect in two related bodies of law, the attorney-client privilege in the law of evidence and the rule of confidentiality established in professional ethics. The attorney-client privilege applies in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule applies not merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law.

Authorized Disclosure

A lawyer may disclose information about a client when necessary in the proper representation of the client. In litigation, for example, a lawyer may disclose information by admitting a fact that cannot properly be disputed, or in negotiation by making a disclosure that facilitates a satisfactory conclusion.

Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

Disclosure Adverse to Client

The confidentiality rule is subject to limited exceptions. In becoming privy to information about a client, a lawyer may foresee that the client intends serious and perhaps irreparable harm to another person. To the extent a lawyer is prohibited from making disclosure, the interests of the potential victim are sacrificed in favor of preserving the client's confidences even though the client's purpose is wrongful. To the extent a lawyer is required or permitted to disclose a client's purposes, the client may be inhibited from revealing facts which would enable the lawyer to counsel against a wrongful course of action. A rule governing disclosure of threatened harm thus involves balancing the interests of one group of

potential victims against those of another. On the assumption that lawyers generally fulfill their duty to advise against the commission of deliberately wrongful acts, the public is better protected if full disclosure by the client is encouraged than if it is inhibited.

Generally speaking, information relating to the representation must be kept confidential, as stated in paragraph (a). However, where the client is or has been engaged in criminal or fraudulent conduct or the integrity of the lawyer's own conduct is involved, the principle of confidentiality may have to yield, depending on the lawyer's knowledge about and relationship to the conduct in question and the seriousness of that conduct. Several situations must be distinguished.

First, the lawyer may not counsel or assist a client in conduct that is criminal or fraudulent. See Rule 1.2(d). As noted in the Comment to that Rule, there can be situations where the lawyer may have to reveal information relating to the representation in order to avoid assisting a client's criminal or fraudulent conduct. Paragraph 1.6(b)(4) permits doing so. Similarly, a lawyer has a duty under Rule 3.3(a)(4) not to use false or fabricated evidence. This duty is essentially a special instance of the duty prescribed in Rule 1.2(d) to avoid assisting a client in criminal or fraudulent conduct. Rule 1.6(b)(4) permits revealing information to the extent necessary to comply with Rule 3.3(a). The same is true of compliance with Rule 4.1 concerning truthfulness of a lawyer's own representations.

Second, the lawyer may have been innocently involved in past conduct by the client that was criminal or fraudulent. In such a situation, the lawyer has not violated Rule 1.2(d), because to "counsel or assist" criminal or fraudulent conduct requires knowing that the conduct is of that character. Even if the involvement was innocent, however, the fact remains that the lawyer's professional services were made the instrument of the client's crime or fraud. The lawyer, therefore, has a legitimate interest in being able to rectify the consequences of such conduct and has the professional right, although not a professional duty, to rectify the situation. Exercising that right may require revealing information relating to the representation. Paragraph (b)(2) gives the lawyer professional discretion to reveal such information to the extent necessary to accomplish rectification.

Third, the lawyer may learn that a client intends prospective conduct that is criminal or fraudulent. Inaction by the lawyer is not a violation of Rule 1.2(d), except in the limited circumstances where failure to act constitutes assisting the client. See Comment to Rule 1.2(d). However, the lawyer's knowledge of the client's purpose may enable the lawyer to prevent commission of the prospective crime or fraud. If the prospective crime or fraud is likely to result in substantial injury, the lawyer may feel a moral obligation to take preventive action. When the threatened injury is grave,

such as homicide or serious bodily injury, the lawyer may have an obligation under tort or criminal law to take reasonable preventive measures. Whether the lawyer's concern is based on moral or legal considerations, the interest in preventing the harm may be more compelling than the interest in preserving confidentiality of information relating to the client. As stated in paragraph (b)(1), the lawyer has professional discretion to reveal information in order to prevent substantial harm likely to result from a client's criminal or fraudulent act.

It is arguable that the lawyer should have a professional obligation to make a disclosure in order to prevent homicide or serious bodily injury which the lawyer knows is intended by a client. However, it is very difficult for a lawyer to "know" when such a heinous purpose will actually be carried out, for the client may have a change of mind. To require disclosure when the client intends such an act, at risk of disciplinary liability if the assessment of the client's purpose turns out to be wrong, would be to impose a penal risk that might interfere with the lawyer's resolution of an inherently difficult moral dilemma.

The lawyer's exercise of discretion requires consideration of such factors as the magnitude, proximity and likelihood of the contemplated wrong, the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question In any case, a disclosure adverse to the client's interest should be no greater than the lawyer believes necessary to the purpose. A lawyer's decision not to take preventive action permitted by paragraph (b)(1) does not violate this Rule.

The term "another" in paragraph (b)(1) includes a person, organization and government.

Paragraph (b)(2) does not apply where a lawyer is employed after a crime of fraud has been committed to represent the client in matters ensuing therefrom.

Dispute Concerning Lawyer's Conduct

If the lawyer is charged with wrongdoing in which the client's conduct is implicated, the rule of confidentiality should not prevent the lawyer from defending himself. Such a charge can arise in a civil, criminal or professional disciplinary proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, for example, a person claiming to have been defrauded by the lawyer and client acting together. A lawyer entitled to a fee is not prevented by the rule of confidentiality from proving the services rendered in an action

to collect it.

Disclosures Otherwise Required or Authorized

The attorney-client privilege is defined differently in various jurisdictions. If a lawyer is called as a witness to give testimony concerning a client, absent waiver by the client, Rule 1.6(a) requires the lawyer to invoke the privilege when it is applicable.

The Rules of Professional Conduct in various circumstances permit or require a lawyer to disclose information relating to the representation. See Rules 1.13, 2.2, 2.3, 3.3 and 4.1. In addition to these provisions, a lawyer may be obligated or permitted by other provisions of law to give information about a client. Whether another provision of law supersedes Rule 1.6 is a matter of interpretation beyond the scope of these Rules, but a presumption should exist against such a supersession.

Use of Information

A lawyer may not make use of information relating to the representation in a manner disadvantageous to the client. The duty of confidentiality continues after the client-lawyer relationship has terminated. See Rule 1.9.

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WEST'S UTAH RULES OF COURT
UTAH CODE OF JUDICIAL ADMINISTRATION
PART II. SUPREME COURT RULES OF PROFESSIONAL PRACTICE
CHAPTER 13. RULES OF PROFESSIONAL CONDUCT

Current with amendments received through 3-15-2002.

PREAMBLE. A LAWYER'S RESPONSIBILITIES

A lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice. Every lawyer is responsible to observe the law and the Rules of Professional Conduct, shall take the Attorney's Oath upon admission to the practice of law, and shall be subject to the Rules of Lawyer Discipline and Disability.

As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealing with others. As intermediary between clients, a lawyer seeks to reconcile their divergent interests as an advisor and, to a limited extent, as a spokesperson for each client. A lawyer acts as evaluator by examining a client's legal affairs and reporting about them to the client or to others. A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

In all professional functions, a lawyer should be competent, prompt and diligent. A lawyer should maintain communication with a client concerning the representation. A lawyer should keep in confidence information relating to representation of a client except so far as disclosure is required or permitted by the Rules of Professional Conduct or other law.

A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.

As a public citizen, a lawyer should seek improvement of the law, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance and should therefore devote professional time and civic influence in their behalf. A lawyer should aid the legal profession in pursuing these objectives and should help the Bar regulate itself in the public interest.

A lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession and to exemplify the legal profession's ideal of public service.

A lawyer's responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious. Thus, when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done. So also, a lawyer can be sure that preserving client confidences ordinarily serves the public interest because people are more likely to seek legal advice, and thereby heed their legal obligations, when they know their communications will be private.

In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an upright person while earning a satisfactory living. Within the framework of these Rules, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules.

The legal profession is largely self-governing. Although other professions also have been granted powers of self-government, the legal profession is unique in this respect because of the close relationship between the profession and the processes of government and law enforcement. This connection is manifested in the fact that ultimate authority over the legal profession is vested largely in the courts.

To the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated. Self-regulation also helps maintain the legal profession's independence from government domination. An independent legal profession is an important force in preserving

government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice.

The legal profession's relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the Bar. Not only is every lawyer responsible for observing the Rules of Professional Conduct, but the lawyer should also aid in securing observance of the Rules of Professional Conduct by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves.

Lawyers play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship to our legal system. The Rules of Professional Conduct, when properly applied, serve to define that relationship.

Exhibit F

UTAH CODE, 1953
TITLE 78. JUDICIAL CODE
PART III. Procedure
CHAPTER 24. WITNESSES

Current through the 2002 4th Special Session

78-24-8 Privileged communications.

There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate. Therefore, a person cannot be examined as a witness in the following cases:

(1) (a) Neither a wife nor a husband may either during the marriage or afterwards be, without the consent of the other, examined as to any communication made by one to the other during the marriage.

(b) This exception does not apply:

(i) to a civil action or proceeding by one spouse against the other;

(ii) to a criminal action or proceeding for a crime committed by one spouse against the other;

(iii) to the crime of deserting or neglecting to support a spouse or child;

(iv) to any civil or criminal proceeding for abuse or neglect committed against the child of either spouse; or

(v) if otherwise specifically provided by law.

(2) An attorney cannot, without the consent of his client, be examined as to any communication made by the client to him or his advice given regarding the communication in the course of his professional employment. An attorney's secretary, stenographer, or clerk cannot be examined, without the consent of his employer, concerning any fact, the knowledge of which has been acquired in his capacity as an employee.

(3) A clergyman or priest cannot, without the consent of the person making the confession, be examined as to any confession made to him in his professional character in the course of discipline enjoined by the church to which he belongs.

(4) A physician or surgeon cannot, without the consent of his patient, be examined in a civil action as to any information acquired in attending the patient which was necessary to enable him to prescribe or act for the patient. However, this privilege shall be deemed to be waived by the patient in an action in which the patient places his medical condition at issue as an element or factor of his claim or defense. Under those circumstances, a physician or surgeon who has prescribed for or treated that patient for the medical condition at issue may provide information, interviews, reports, records, statements, memoranda, or other data relating to the patient's medical condition and treatment which are placed at issue.

(5) A public officer cannot be examined as to communications made to him in official confidence when the public interests would suffer by the disclosure.

(6) A sexual assault counselor as defined in Section 78-3c-3 cannot, without the consent of the victim, be examined in a civil or criminal proceeding as to any confidential communication as defined in Section 78-3c-3 made by the victim.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-24-8; L. 1977, ch. 140, § 2; 1983, ch. 158, § 2; 1984, ch. 17, § 2; 1989, ch. 103, § 1; 1990, ch. 45, § 1.

U.C.A. 1953 § **78-24-8**

UT ST § **78-24-8**

END OF DOCUMENT

Tab 3

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

IN RE PRUDENTIAL INSURANCE COMPANY OF AMERICA SALES PRACTICES LITIGATION	Master Docket No. 95-4704 (AMW)
	MDL No. 1061 (AMW)
THIS DOCUMENT RELATES TO: ALL ACTIONS	REPORT & RECOMMENDATION

JOEL A. PISANO, UNITED STATES MAGISTRATE JUDGE:

This matter comes before the Court on the cross-motion of counsel for The Prudential Insurance Company ("Prudential") to sanction and disqualify J. Bruce Miller, Esq. ("Miller"), lead/liaison counsel for plaintiff sales agents who have filed wrongful termination or retaliation claims against Prudential. The matter was referred to the undersigned for Report and Recommendation by the Hon. Alfred M. Wolin.

Miller has filed opposition to Prudential's cross-motion, and the Court heard oral argument on February 11, 1997. For the reasons that follow, the undersigned recommends that Prudential's cross-motion to disqualify Miller be granted.

BACKGROUND

I. ONGOING MULTI-DISTRICT LITIGATION

In February and March of 1995, a number of class action lawsuits against Prudential were filed by life insurance policyholders alleging a scheme of improper and illegal sales practices that continued from the 1980's through the early 1990's. (Report of Special Master's Investigation at 2.) These alleged practices included the sale of vanishing premium policies, where the policyholder was told that after he paid a certain amount of premiums for a certain period of time the policy would be paid in full, but in fact after that time additional premiums continued to be due. Another alleged practice was known as "churning," or "financed" insurance, where an individual's pre-existing policy was used to finance the payment of premiums for a new, more expensive policy. This practice benefitted the sales agents and managers, who received credit and commissions for an additional sale. Customers who had built up equity in less expensive policies, however, saw that equity depleted as it was used to finance the price difference between the old and new policies until the old policy lapsed. Yet another alleged scheme involved misrepresenting life insurance products as private pension plan, retirement plan, and nursing home insurance products.

One of the individual policyholder suits, Key v. Prudential ("Key") was tried to a jury in Guntersville, Alabama in August of 1995. In that suit the plaintiff alleged fraud in connection

with a vanishing life insurance policy he had purchased from Prudential. When the premiums did not vanish, he sued, the jury awarded him $25,000,000, and the case was eventually settled. (Transcript of January 30, 1997 Hearing at 21-22, 36.[1]) Key's attorneys were Clay Hornsby ("Hornsby") and Larry Morris ("Morris") of Morris, Haynes, Ingram & Hornsby, Alexander City, Alabama.

In 1995 another wave of cases against Prudential were filed by sales agents who alleged wrongful termination or retaliation by Prudential. (Id. at 6.) These cases are related to the policyholder cases in that the plaintiff sales agents are alleging that the adverse personnel actions taken against them were in some way connected with improper sales practices. For example, some agents are claiming that they were terminated for low sales figures, even though more successful agents who were not terminated achieved higher sales only by engaging in illegal sales practices. (Id. at 12-14.)

One of these cases was filed by Rick A. Martin ("Martin") in the United States District Court for the Western District of Kentucky on January 30, 1995. (Id. at 6.) On August 3, 1995, the Judicial Panel on Multi-District Litigation transferred all actions relating to Prudential sales practices, including all class actions, individual actions, and sales agent and whistleblower actions (collectively, "MDL"), to the District of

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[1] At this hearing, Mr. Miller and counsel for Prudential stipulated to much of the factual background set forth below.

New Jersey. Pursuant to the transfer order, all pre-trial proceedings were centralized before Judge Wolin. Miller, who was Martin's attorney, was appointed lead/liaison counsel for the sales agent plaintiffs. (Transcript of January 30, 1997 Hearing, at 6.)

Presently, there are approximately 20 sales agent cases included in the MDL, with Miller counsel of record for four plaintiffs, all of whom are former agents of Prudential.[2] There are approximately 40 more sales agent cases pending in state courts. Miller also represents four of these plaintiffs[3], (Id. at 10-11), and initially served as co-counsel in Rutt v. Prudential, which was filed in state court in Pennsylvania, (Miller's November 5, 1996 Affidavit at 2).[4] As to all the sales agent plaintiffs, in December of 1995 Prudential moved to compel arbitration pursuant to agreements signed by their sales agents and sales management personnel. Judge Wolin denied the motion, holding that the MDL sales agent cases fell within the business insurance exception to arbitrability and are not subject to mandatory arbitration. (Transcript of January 30, 1997 Hearing at 17-19.) All the MDL sales agent cases are presently stayed pending Prudential's appeal to the Third Circuit on this issue.

[2] These plaintiffs are Rick Martin, Rick Walters, Thomas Cerchia, and Paul Maddy. (Miller's November 5, 1996 Affidavit at 1.)

[3] These plaintiffs are William Yancey, Thomas Snowdon, Charles Ehling, and Niles Oinonen. (Miller's November 5, 1996 Affidavit at 2.)

[4] In early December, 1996, the Rutt case was settled.

A recurring theme in the MDL is "the persistent and recurrent destruction of documents" by agents and employees of Prudential in the face of multiple policyholder and agent lawsuits. (Wolin Opinion of January 6, 1997 at 1.) Prudential documents have been destroyed in Jacksonville, Florida, Cambridge, Massachusetts, Des Moines, Iowa, and Syracuse, New York. In Syracuse, additional materials were spirited out of Prudential's office to avoid detection by Prudential personnel monitoring compliance with Judge Wolin's September 15, 1995 order to preserve all documents and records. (Id. at 40.) In Cambridge, between February and November 1996, approximately 9000 client files were "cleansed" and 80 folders of documents were destroyed. (Id. at 40-41.) On January 6, 1997, Judge Wolin ordered Prudential to pay $1,000,000 in fines for its failure to implement a document preservation policy in accordance with the Court's document preservation order. Following this order, the Court appointed Justin P. Walder, Esq. ("Walder") to investigate two reported incidents, Prudential's alleged withholding of memoranda written by James C. Helfrich, Esq. ("Helfrich"), an in-house counsel at Prudential's Jacksonville, Florida office, and alleged document destruction by Michael Barr, Esq. ("Barr"), a partner of the law firm of Sonnenschein, Nath & Rosenthal ("Sonnenschein"), Prudential's lead outside counsel in the sales practices litigation.

In November and December of 1992, Helfrich wrote at least two memoranda warning Prudential's senior management that a

significant number of complaints had been received relating to financed insurance sales, and that Prudential needed a plan to address and correct the problem. (Wolin Opinion of January 29, 1997 at 2-3.) After Prudential failed to take action as recommended in the memoranda, Helfrich presumably became disenchanted with his employment. He eventually negotiated for a severance package and left Prudential in July of 1995. (Transcript of January 30, 1997 Hearing at 547.)

In response to a subpoena, Prudential produced the Helfrich memoranda to the Florida Attorney General in January of 1996, but did not produce the memoranda to the Multi-State Task Force[5] ("Task Force") until July 2, 1996, even though in April and May of 1996 representatives of the New Jersey Department of Insurance, on behalf of the Task Force, orally requested Prudential to produce the type of documents that would include the Helfrich memoranda. (Wolin Opinion of January 29, 1997 at 4.) The Helfrich memoranda were produced to the Task Force just eight days before it was to release a final report addressing Prudential management's knowledge of improper sales practices. Its report, compiled after 14 months of investigation, concluded that senior management should have known about improper sales practices as early as 1992, (Id. at 5), and recommended a

[5] The Multi-State Task Force was formed by the New Jersey Department of Insurance and comprises the insurance regulatory bodies for 45 states and the District of Columbia. The Task Force was assembled to investigate abuses in the marketing and sale of life insurance products by Prudential and other insurance companies.

$35,000,000 fine and restitution to consumers, (Wall Street Journal, July 15, 1996, B9B). If the memoranda had been timely produced, the Task Force's report would have included a definitive finding that Prudential's senior management did know about improper sales practices. (Wolin Opinion of January 29, 1997 at 5.)

On September 8, 1995, Michael Barr, an outside litigation attorney for Prudential, shredded a number of documents at Prudential's law department in Jacksonville, Florida. (Report of Special Master's Investigation at 5.) In fact, the shredding took place in the office formerly occupied by Helfrich, which was immediately next door to the office occupied by John Massaro, Esq. ("Massaro"), an in-house counsel at Prudential's Jacksonville office and former colleague of Helfrich. (Id. at 20.) After an intensive fact investigation, including the taking of six depositions, the Special Master concluded that the documents shredded were excess photocopies and that, while shredding the documents was an error in judgment because it was understandably misinterpreted by others, it did not constitute an obstruction of justice, a willful or knowing destruction of documents, a violation of court order, or a violation of the Rules of Professional Conduct. (Id. at 30-31.)

As to the Helfrich memoranda, the Special Master found that it was produced in a timely manner to the Florida Attorney General and Department of Insurance but should have been earlier produced to the Task Force. (Id. at 29-30.) The Special Master's

Report was adopted in its entirety by order of Judge Wolin on January 29, 1997.

From this complex progression of events, two subplots emerge to dictate Miller's fate in the cross-motion presently before the Court. These are, in chronological order, first, the giving of testimony by Rick Martin, one of the sales agent plaintiffs represented by Miller, during Key v. Prudential, and, second, Miller's representation of John Massaro, who sought his advice in December of 1996 regarding his concerns over Barr's document destruction and the withholding by Prudential of the Helfrich memoranda.

II. MARTIN'S TESTIMONY IN KEY V. PRUDENTIAL

Rick Martin was a District Manager of the Paducah, Kentucky District at Prudential until his employment was terminated in 1992. (Transcript of January 30, 1997 Hearing at 23.) Thereafter he was unable to find comparable work, and in May of 1992 accepted employment as a mobile home salesperson at a salary of $12,000 per year. (Miller Deposition at 28.)

Miller commenced representation of Martin in February of 1993, (Miller Letter to Martin of February 12, 1993), and filed suit on his behalf in January of 1995.

Sometime during the spring of 1995, Hornsby and his law firm learned of Martin's lawsuit and determined that they wanted to present his testimony in the Key case. Miller has suggested that their interest may have been piqued by an article published in Newsweek magazine, which mentioned Martin's suit. (Miller

Deposition at 99.) Letters and phone calls were exchanged,[6] and on July 29, 1995, Miller drove from Louisville, Kentucky to Nashville, Tennessee in time to meet Martin for an 8:00 a.m. breakfast meeting at the Marriott Hotel. Then they drove to a conference room at the airport, where they met Hornsby and Morris to determine whether a suitable financial arrangement could be made so that Martin would testify in the Key case. (Transcript of January 30, 1997 Hearing, at 39.) Miller brought retainer agreements to the meeting, and these agreements referred to Martin's testimony as "expert testimony," but no signed copy of a retainer agreement can be located. (Id. at 40.) After the first few minutes of the meeting, they broke into two groups, in which Miller and Morris agreed on the financial arrangements and terms and conditions of retention, and Martin and Hornsby discussed the content of Martin's testimony. Miller and Morris agreed that Martin would be paid an initial fee of $7,500[7] and Miller's firm would be paid an initial fee of $10,000. (Id. at 41.) Miller has

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[6] A fair reading of the letters is that Miller functioned as an agent brokering Martin's testimony. Martin is not denoted an expert in the letters written prior to July 3, 1995. See Letter from Hornsby to Miller of May 26, 1995 ("We would sure like to use Mr. Martin as a witness as it concerns his experience at Prudential regarding the pressure to sell and selling vanishing premium on 'paid-up' variable life insurance policies.") (emphasis added). See also Letter from Hornsby to Miller of May 30, 1995 ("It would be a huge help to our case if Rick A. Martin could come live and testify. We would be able to reimburse him for all his expenses including time off from work.").

[7] This fee was based on a rate of $100 per hour, so that if Martin spent more than 75 hours preparing for and giving his testimony, he would have been paid $100 for each additional hour, but if he spent less than 75 hours, he would not have to refund any of the $7,500. (Miller Deposition at 295-297.)

characterized the $10,000 payment as a "signing bonus." (Id. at 87.) Financial arrangements were not further discussed once the four men reconvened at the end of the morning. (Hornsby Deposition at 73.) Thereafter, a number of discussions regarding the content of Martin's Key testimony took place between Martin and Miller, between Martin and Denis Fleming ("Fleming"), then an associate working for Miller, and between Fleming and Hornsby. (Transcript of January 30, 1997 Hearing at 44.)

The agreed upon funds were deposited by Miller into a trustee account on August 11, 1995, and on August 17, 1995 Miller wrote a check from the trustee account to Martin in the amount of $7,500. Martin deposited the $7,500 check into his account on August 22, 1995. (Id. at 68.) Thereafter, Miller used part of the $10,000 payment to his firm to pay expenses associated with the prosecution of Martin's case against Prudential. (Id. at 72-73.) The Hornsby-Morris firm cut a third check, dated December 29, 1995 and made payable to the Miller Law Group, in the amount of $8,587 for legal services rendered. (Transcript of December 2, 1996 Hearing at 15.)

Miller was not present during Martin's testimony in the Key case August 23, 1995. On that day he was in St. Louis conducting depositions in an entirely unrelated matter. (Miller Deposition at 61.) Miller's associate, Mr. Fleming, accompanied Martin to Guntersville but left the courtroom just before Martin took the stand. (Hornsby Deposition at 120-121.) Miller's explanation for Fleming's absence is that Hornsby and Morris preferred to have

only local attorneys, themselves, present during Martin's testimony, to strike as great a contrast as possible between Mr. Key's and Prudential's litigations teams. (Miller Deposition at 62-63.) It is undisputed, however, that Martin never submitted an expert report, was never qualified as an expert and, in fact, gave only fact witness testimony relating to his experience as a Prudential agent. Martin's entire testimony covers 39 pages of the Key trial transcript and took less than one hour. (Hornsby Deposition at 158.) He was not asked to give any opinion, and nothing he said could even remotely be characterized as expert testimony.

Martin testified at trial that he was not aware of the financial arrangements that had been made in connection with his testimony, even though he had deposited the $7,500 check one day earlier.

> Q (By Mr. Hornsby) And tell the members of the jury so that we're all clear on it, have we--what about payment? How are you being compensated?
>
> A Well, we haven't worked out a compensation. My understanding is that there will be compensation. They have paid for my travel. Ah, my income has been greatly reduced and my insurance career has been, ah, severely damaged--
>
> (Prudential Attorney) Objection, Your Honor. That's not responsive.
>
> Q (By Mr. Hornsby) All right. Do we offer to pay you an hourly rate?
>
> A ——Ah, I--I don't have any hourly figures of any kind, no, sir.

(Discussion off the record between Mr. Hornsby and Mr. Morris.)

(In open court:)

Q (By Mr. Hornsby) Mr. Martin, have you ever known one of these policies, variable life policies, to abbreviate?

A No, sir.

Q To be paid up?

A No, sir.

(Kev v. Prudential Transcript at 535.) He has since indicated that he was confused by Hornsby's questions and regretted giving the above testimony.

> But I did not know what my ultimate compensation would be because I was still in testimony. I was still working on the case, and I knew that figure could go up or down, so I was damned if I did and damned if I didn't. The question was not asked specifically. The man asking it knew the answer to the question, and when he knew--at the point when he asked the next question about the hourly--and it was very evident that I had no idea, and it should have been very apparent to them before trial or at that point that they didn't have a signed agreement from me--you know, they should have said something or reasked the question in a way that I could answer it truthfully. I answered it as best I could. It sort of ticked me off, I guess, to some degree.

(Martin Deposition at 210-211.)

> Q My question remains what it was, if we could tomorrow go back down to Guntersville and retry that case, for you to have Mr. Hornsby ask the questions right so that you could give a full answer--I know you believe you gave an honest answer--but so you could give a full answer so that the number $7,500 could get out there on the table, in your heart, Mr. Martin, in your heart, would you like us to go down there tomorrow and do that

> in Guntersville, Alabama? Just say yes or no.
> A I guess it would have to be yes.

(Id. at 249-250).

Later the same day of his trial testimony, Martin discussed his concerns with Fleming.

> We pretty much went back through the testimony as I could recall, and certainly that was one of the things that I recalled being perplexed about and not being able to answer it. I felt very, very solid about everything else I had answered, and I felt solid about answering this the way that I did. I was just not comfortable with the way that they asked the question.

(Id. at 216.) Martin said he did not recall discussing his concerns with Miller, (Id. at 220-221), but that he might have done so, (Id. at 238).

The Key jury returned a verdict for the plaintiff in the amount of $25,000,000. After this figure was reported in the national news and the National Law Journal, Miller received approximately 300 telephone calls from policyholders' attorneys who wished to "hire" Martin as a witness. (Transcript of November 9, 1995 Hearing at 61.)

On November 22, 1996, Judge Wolin called Miller and read him portions of Martin's Key testimony, in which it was obvious that Martin was offered as a fact witness rather than as an expert. Miller has stated that he was "stunned" by this discovery, (Miller Deposition at 80), and that prior to the phone call, he had assumed Martin had given expert testimony, (Id. at 280-281.)

III. MILLER'S REPRESENTATION OF MASSARO

John Massaro is a corporate general counsel for Prudential's Jacksonville, Florida office. While he has been on a paid leave of absence since September of 1996, no explanation for his leave can be found in the record before this Court.

In 1995 and 1996, Massaro had a rolling case load of approximately 70 sales practices cases filed against Prudential. Included among his cases was Prudential's defense of the Rick Martin action, for which Massaro had "in-house responsibility" and retained local counsel. (Massaro Deposition at 94-95.) He also approved draft letters written by local counsel assigned to the Martin case. (Id. at 102). In February of 1995, Massaro composed a five-page, single-spaced letter to local counsel, which included his observations about the case, his reaction to Miller's settlement demand made on behalf of Martin, and his recommendations concerning Prudential's response to those demands. (Id. at 96, 97, 99-100, 103-104.)[8]

Massaro was also the in-house counsel responsible for the defense of Snowden v. Prudential from early 1996 through August 1996. Since November, Miller has been plaintiff's counsel in Snowden. (Reply Brief at 1.)

Although Massaro had certainly heard of Miller, Miller

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[8] Because Prudential has never waived its privilege as to the content of Massaro's work product, this Court ordered that Massaro's deposition be taken under seal. To the extent this Report and Recommendation refers to Massaro's work product, the writer will attempt to summarize the import thereof without divulging its specific content.

claims never to have heard of Massaro before December 16, 1996, when Massaro telephoned him at his office late in the afternoon. (Miller Deposition at 401.) During this call, Massaro expressed deep concern over document destruction and document withholding at Prudential, (Id. at 402-403), and, in fact, his voice broke and he had difficulty maintaining his composure during the call, (Massaro Deposition at 390).

In particular, Massaro told Miller that he was distraught over document shredding at Prudential by Michael Barr, and Prudential's delay in turning over the Helfrich memoranda. In fact, Massaro had heard grinding noises as Barr had operated the shredding machine in the office right next door to Massaro's in Prudential's Jacksonville office, (Id. at 455); however, Massaro did not express concern over this incident until more than a year later, (Report of Special Master's Investigation at 24).

In connection with his leave of absence from Prudential, Massaro had hired Thomas Tew, Esq. ("Tew"), a highly regarded Florida attorney who specialized in insurance matters, to represent him in negotiations with Prudential regarding his employment. Tew, however, was either unable or unwilling to represent him regarding his document destruction concerns. According to Miller, Massaro informed him that when Tew declined this representation he had cited overwork due to a retainer agreement he had signed with the City of Miami. (Miller Deposition at 428-430.) When asked directly why Tew was not his lawyer on this issue, Massaro cited the attorney-client

privilege. (Massaro Deposition at 522.) Massaro had also contacted Judy Hoyer and David Gross, two attorneys representing separate plaintiffs in suits against Prudential, but it is unclear whether or not either or both declined to represent him. (Miller Deposition at 526-528.) Massaro claims that an attorney-client relationship was established with regard to both Hoyer and Gross. (Massaro Deposition at 535.)

Massaro gives various reasons to explain how he selected Miller. He has stated that he learned of Miller by locating the J. Bruce Miller Law Group home page on the Internet by searching with the keyword "Prudential," (Id. at 245), and also that he sought out Miller because he was the lawyer most focused on the issue of document destruction by Prudential, (Id. at 531-532), by virtue of Miller having joint authority with Prudential to conduct discovery on this issue.[9] Either way, Massaro knew by December 16, 1996 that Miller was the plaintiff's attorney adverse to Prudential in the Martin case. (Id. at 388-389.) In fact, in an August 22, 1995 memo, Massaro had described Miller and Martin in most derogatory terms. (Id. at 537-538.) Nonetheless, Massaro has minimized Miller's history with Prudential as a factor in his decision to hire Miller. (Id. at 539.)

During one of their telephone conversations, Massaro asked Miller to represent him. Miller says that Massaro assured him

[9] Miller was given this authority by Judge Wolin's order dated November 6, 1996.

that the Sonnenschein law firm, Prudential's New York attorneys, controlled all the decisions made regarding pending sales practices litigation, and that Massaro and Prudential's Jacksonville office had only ministerial responsibilities associated with the litigation. (Miller Deposition at 409-410.) Miller also says that Massaro never made him aware that Massaro discussed settlement proposals, including one made by Miller, with local counsel. (Id.)

Because Massaro had an attorney-client relationship with Prudential, and Miller was plaintiff's counsel adverse to Prudential in a number of cases, Miller and several of his associates then conducted legal research on an expedited basis to determine whether an exception to the attorney-client privilege might apply to permit Massaro to disclose Prudential's confidences to him or to others. (Id. at 436-439.) Miller unilaterally determined that the crime-fraud exception applied to permit disclosure, and undertook representation of Massaro on a pro-bono basis. (Id. at 451-452.)

Miller has stated that he and Massaro had an understanding that his representation was limited to issues of document destruction by Prudential; however, Miller's engagement letter wherein he agrees to undertake the representation does not limit its scope in any way. (Letter from Miller to Massaro of December 18, 1996.)

When Massaro was deposed during the Special Master's investigation of the Helfrich memoranda and Barr document

shredding incidents, he was questioned regarding 35 pages of confidential, media-sensitive notes that Massaro had written while working on cases for Prudential and that he had reviewed prior to composing his affidavit on the two incidents. (Massaro Deposition at 349-350.) These notes included Massaro's settlement strategies in Martin v. Prudential and his mental impressions following a conversation with Clayton Boulware, a Prudential in-house general counsel, regarding defense strategies in Warden Cognetti v. Prudential, the first whistleblower case Prudential took to trial.[10] (Transcript of February 11, 1997 Hearing at 121-122.) Following the deposition, Massaro and Miller each took away a copy of these notes and separately worked on the redactions to be made to protect Massaro's attorney-client confidences given to Tew regarding employment issues. When Massaro gave these notes to Miller, there is no question that he divulged confidential attorney-client communications subject to Prudential's privilege. Miller's and Massaro's separate versions later were incorporated together by Miller's office manager. (Id. at 125-126.)

On December 23, 1996, Massaro, accompanied by Miller, met two investigators from the Florida Attorney General's Office in a hotel room at the Jacksonville Marriott. The meeting lasted for six or seven hours, during which Massaro communicated his

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[10] The Sonnenschein defense attorneys who tried this case for Prudential were Michael Schlanger, Esq. and Gregory Karawan, Esq. (Transcript of February 11, 1997 Hearing at 123.) Mr. Schlanger now serves as Prudential's lead counsel in support of the present cross-motion to disqualify Mr. Miller.

concerns regarding document shredding at Prudential by Michael Barr, and Prudential's delay in turning over the Helfrich memoranda. (Massaro Deposition at 507.) (Miller Deposition at 499.) Massaro also indicated that he was concerned for his personal safety. (Id. at 500.) Although questioned at length on the subject of his apprehension, Massaro never articulated any basis for his fear. (Massaro Deposition at 499-509.)

With the knowledge of the Florida Attorney General's office and Massaro, Miller tape-recorded the meeting. (Miller Deposition at 506.) Miller then advised Massaro that the best way to guarantee his personal safety was to "go public and blow the whistle" on Prudential. (Id. at 504.)

Immediately after the meeting, Massaro and Miller met with Scot Paltrow ("Paltrow") in a restaurant in the same Jacksonville Marriott where the interview took place. Paltrow is a reporter for the Los Angeles Times. (Id. at 507.) The three men then discussed what Massaro had told the regulators; this conversation lasted approximately 35 minutes. (Massaro Deposition at 456-459.) At the conclusion of the meeting, Miller and Massaro gave Paltrow the tapes of the meeting with the Florida investigators. (Miller Deposition at 507.) On December 26, 1996, Paltrow telephoned Massaro and read him a draft of the story, which Massaro apparently approved. (Massaro Deposition at 463-464.) The story was published the next day.

ANALYSIS

Prudential rests its cross-motion to disqualify on both the Martin and Massaro sub-plots to this litigation. Prudential interprets Miller's role in l'affaire Martin such that he should be disqualified for negotiating and procuring fees for fact testimony. Miller's defense is that his version of what transpired should be believed. Next, Prudential invokes what it is calling the migratory attorney doctrine, i.e., once an attorney shifts his allegiances during a litigation or related litigation, the counsel adverse to his former client must be disqualified because client confidences are presumed to have been disclosed. Here Miller relies upon the crime-fraud and self-defense exceptions to the attorney-client privilege.

I. MARTIN'S TESTIMONY IN KEY V. PRUDENTIAL

It is unethical to pay any fact witness a fee that clearly exceeds travel expenses plus the reasonable value of time lost. Golden Door Jewelry Creations, Inc. v. Lloyds Underwriters Non-Marine Ass'n, 865 F. Supp. 1516, 1521, 1526 and n. 11 (S.D. Fla. 1994) (holding that a lawyer is prohibited "from paying or offering to pay money or other rewards to witnesses in return for their testimony, be it truthful or not, because it violates the integrity of the justice system and undermines the proper administration of justice"). Payments for fact witness testimony that exceed travel expenses and the value of time lost are also

illegal under the federal bribery statue, 18 U.S.C. § 201(c)(2)[11] and violate Rule 3.4 of the New Jersey Rules of Professional Conduct.[12] It is undisputed nonetheless that Rick Martin testified as a fact witness in Key v. Prudential, and that he was paid handsomely for his testimony. Hornsby admits that the payments to Martin and Miller of approximately $25,000 were "a good bit," (Hornsby Deposition at 156), and more than he personally felt they should have been, (Id.) (October 19, 1996 Affidavit of Samuel H. Franklin at 2).

The facts indicate that Miller brokered Martin's testimony in such a way that he could plausibly deny being aware of its content, while Martin could plausibly deny knowing its price. For this reason, Miller/Morris and Martin/Hornsby conducted divided meetings at the Nashville Marriott. But later, during conversations among Miller, Martin, Fleming, Hornsby, and Morris which took place after the bargain was struck, details of the planned testimony were shared with Miller, and details of the financial arrangements were shared with Martin, who in any case received partial payment the day before he testified.

Miller and Fleming have given an innocent explanation for their absence during Martin's testimony, that Key would benefit

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[11] 18 U.S.C. § 201(c)(2) makes it a crime to directly or indirectly give, offer, or promise "anything of value to any person, for or because of the testimony under oath or affirmation given or to be given by such person as a witness upon a trial, hearing, or other proceeding, before any court...."

[12] Under R.P.C. 3.4(b), a lawyer shall not "offer an inducement to a witness that is prohibited by law."

from having only Alabama lawyers seated in the courtroom. The Court finds it more likely that they, first, did not want to be in the room when fact testimony was given, and, second, hoped their absence would permit Miller to say that he did not know what Martin's testimony was.

It appears certain that Miller and Martin planned to reap financial rewards from a testimonial dog and pony show to be billed as the trial highlight of lawsuits against Prudential across the country. This egregious conduct cannot be countenanced. Accordingly, Miller must be held accountable for misconduct regarding the Martin testimony in the Key case, by virtue of his obtaining a fee for procuring the testimony of a fact witness, and his assisting a fact witness in obtaining a payment for his testimony. Disqualification thus is warranted on this issue.[13]

II. MILLER'S REPRESENTATION OF MASSARO

Cases giving rise to motions to disqualify often involve factual situations where an attorney or expert switches sides. See NCK Organization Ltd. v. Bregman, 71 F.R.D. 338, 340 (S.D.N.Y.) (disqualifying attorney who, following termination of

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[13] There is no doubt that Martin gave false testimony during Key v. Prudential when asked about his compensation. Further, the Court questions the conduct and intentions of Hornsby and Morris, who solicited Miller, participated in Martin's wrongdoing, and failed to call to the trial judge's attention the fact that Martin had testified falsely. Accordingly, the Court must recommend that the matter of Martin's testimony and the attorneys' conduct be referred for such investigation and disciplinary action as may be deemed appropriate by the Alabama and Kentucky attorney ethics committees.

his services as in-house counsel for plaintiff corporation, undertook representation of a defendant in the very same litigation on which he had formerly worked when employed by the plaintiff), aff'd, 542 F.2d 128 (2d Cir. 1976). See also Cardona v. General Motors Corp., 942 F. Supp. 968, 978 (D.N.J. 1996) (affirming disqualification of law firm representing plaintiffs in lemon law actions after the firm hired an attorney who had represented the automobile manufacturer in his prior employment); Dewey v. R.J. Reynolds Tobacco Co., 109 N.J. 201, 216 (1988) (disqualifying plaintiff's attorney whose former law partner represented the defendants in the same case).

The attorney need not have actually divulged client confidences to the other side in order to be disqualified. Actual disclosure is not the test; rather the test is whether there is a risk that confidential information has been used unfairly. Cordy v. Sherwin-Williams Co., 156 F.R.D. 575, 584 (D.N.J. 1994) (disqualifying both the defense counsel and the expert retained by defense counsel when the plaintiff's attorney had previously consulted the expert on the same case). Steel v. General Motors Corporation, 912 F. Supp. 724, 738 (D.N.J. 1995) (disqualifying law firm representing lemon law plaintiffs after the firm hired an attorney who had previously represented the automobile manufacturer in other lemon law cases), order aff'd by 942 F. Supp. 968 (D.N.J. 1996). See also Millburn Marketing Associates v. Parker Laboratories, Inc., 1994 WL 228531 at *4 (D.N.J.) ("The law relies upon possible, rather than actual,

possession of relevant confidences...."). Furthermore, the attorney's lack of memory of receiving confidential information due to the passage of time cannot rebut the presumption that in the past confidences were revealed. Id. at *5.

Any doubts that arise in connection with a motion for disqualification must be resolved in favor of disqualification. NCK Organization, 71 F.R.D. at 340. Millburn Marketing, at *5.

Rather than an attorney who has switched sides, the cross-motion presently being decided involves an attorney who has become the client of counsel for the other side. The Court has never encountered a factual situation similar to this one. At least one published case, however, squarely addresses this rare circumstance. In Hull v. Celanese Corp., 513 F.2d 568 (2nd Cir. 1975), a civil rights plaintiff ("Hull") filed suit against her employer, alleging sex-based discrimination in violation of Title VII. After the corporation filed its answer, a female attorney in its in-house legal department ("Delulio"), who had worked on the defense of the case, intervened as a plaintiff in the action. Hull and Delulio were represented by the same law firm. The corporation then sought and was granted disqualification of the firm, even though the firm had made efforts to avoid the receipt of any confidence.

The Hull court was presented with a "divergence from the more usual situation of the lawyer switching sides to represent an interest adverse to his initial representation." Id. at 572. In Hull, "the in-house counsel for Celanese switched sides to

become a plaintiff (rather than a lawyer) on the other side." Id. The court observed that "the matter at issue is not merely 'substantially related' to the previous representation, rather, it is exactly the same litigation," and further observed that the admonition to avoid even the appearance of impropriety should apply just as it would in the more typical situation of a lawyer changing sides. Id. The court then concluded that "disqualification is 'a necessary and desirable remedy ... to enforce the lawyer's duty of absolute fidelity and to guard against the danger of inadvertent use of confidential information....'" Id. (citations omitted). As the matter presently being decided also involves an in-house counsel switching sides to become a client rather than a lawyer on the other side, this Court finds the logic of Hull to be compelling.

Attorneys in this proceeding are governed by the New Jersey Rules of Professional Conduct ("R.P.C."), even as to conduct occurring in other states. See In re Prudential Insurance Company of America Sales Practices Litigation, 911 F. Supp. 148 (D.N.J. 1995. The following rules are implicated in the present motion:

> R.P.C. 1.6(b), 1.6(c), 1.6(d)
> A lawyer shall reveal [information relating to representation of a client] to the proper authorities, as soon as, and to the extent the lawyer reasonably believes necessary, to prevent the client [from committing a crime or fraud] or [from perpetrating a fraud upon the tribunal].
>
> A lawyer may reveal such information to the extent the lawyer reasonably believes necessary [to rectify the consequences of the crime or fraud] or to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client....

> Reasonable belief for purposes of R.P.C. 1.6 is the belief or conclusion of a reasonable lawyer that is based upon information that has some foundation in fact and constitutes prima facie evidence of the matters referred to in subsection (b) or (c).
>
> R.P.C. 8.4(a)
> It is professional misconduct for a lawyer to violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the act of another.
>
> R.P.C. 1.7(c)(2)
> [I]n certain cases or situations creating an appearance of impropriety rather than an actual conflict, multiple representation is not permissible, that is, in those situations in which an ordinary knowledgeable citizen acquainted with the facts would conclude that the multiple representation poses substantial risk of disservice to either the public interest or the interest of one of the clients.

The record shows that Prudential's confidences were, in fact, divulged to Miller. At a minimum, Massaro shared the 35 pages of confidential notes which included Massaro's mental impressions regarding defense strategies in both Martin v. Prudential and Warden Cognetti v. Prudential. In order to recommend redactions that would protect Massaro's attorney-client confidences given to Tew regarding Massaro's employment, Miller had to read every word of these notes. Thus, Massaro has violated R.P.C. 1.6(b), 1.6(c), and 1.6(d), and Miller was the beneficiary of his disclosures.

There is no doubt that Massaro has also divulged Prudential's confidences regarding document destruction and withholding. By way of justification of Massaro's disclosure of

these confidences, Miller cites the crime-fraud exception and the self-defense exception to the attorney-client privilege. This reliance is misplaced, however, because, as to both exceptions, the lawyer may reveal confidences only to the extent he reasonably believes necessary, based upon information that has some foundation in fact. The law thus presents three difficulties that Miller is unable to surmount. First, the crime-fraud exception does not apply, because the Special Master's Report concludes that neither the Barr incident nor the Helfrich memoranda could be construed as an ongoing crime or fraud at the time of Massaro's disclosure. Second, the self-defense exception does not apply, because Massaro has never been called upon to defend his conduct as an attorney for Prudential.[14] Finally, even if the crime-fraud or self-defense exception did apply, no reasonable attorney would conclude that the proper disclosure would be to the Los Angeles Times. In this instance, rather, the proper course of action would have been for Massaro to go to the tribunal to obtain a judicial determination and court order that an exception to the privilege applies. United States v. Zolin, 491 U.S. 554 (1989).

Thus, at a minimum, Miller has violated R.P.C. 8.4(a) and R.P.C. 1.7(c)(2), by assisting Massaro's breach of his duty of confidentiality and attorney-client privilege to Prudential.

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[14] The lawyer's self-defense exception has possible application in a suit for malpractice, a bar disciplinary charge, a criminal case, or when the lawyer brings an action against the client for fees. Edna Epstein, The Attorney Client Privilege and the Work Product Doctrine at 278 (American Bar Association, 1997).

The Court has questioned whether Massaro was in need of legal representation, even assuming that he had a legitimate concern over Prudential's conduct in connection with Barr's destruction of documents and the withholding of the Helfrich memoranda. Nevertheless, if Massaro felt the need to seek legal advice as to his obligations on those subjects, it is clear that J. Bruce Miller was not among the attorneys practicing in this country eligible to provide that advice. The Court concludes that Massaro chose Miller because he had, for reasons yet unexplained, become embittered with Prudential and decided to switch sides. Miller argues that he was the logical person for Massaro to call because no other attorney had authority to conduct discovery on document destruction issues. The undeniable flaw with this argument is that Prudential counsel also had this authority, and Massaro could have sought their advice without violating client confidences.[15]

The facts in this case are extraordinary; the decision to be made is not close. Once Miller established an attorney-client relationship with Massaro, he was presumed to have obtained, and in fact did obtain, access to Prudential's confidences, including its defense strategies in cases filed by plaintiffs represented by Miller. Accordingly Miller's disqualification is warranted on

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[15] If Massaro testified truthfully that an attorney-client relationship was established with regard to both Hoyer and Gross, then these attorneys may also be subject to disqualification. The Court recommends that Prudential be given leave to depose Hoyer and Gross. The Court will entertain such further motions as may be appropriate following those depositions.

this basis as well.[16]

REMEDIES

Prudential seeks the following relief: (1) disqualification of J. Bruce Miller and his firm from representing Rick Martin and other former Prudential sales agents in the pending MDL; (2) disqualification of J. Bruce Miller as lead/liaison counsel in the MDL; (3) an injunction against Miller continuing the representation of plaintiffs whose cases against Prudential are pending outside the MDL; (4) an injunction against Miller pursuing or taking new cases against Prudential, whether agent or policyholder cases, in any state or federal forum; (5) an injunction against Miller taking compensation or anything of value in consideration of his involvement in any agent or policyholder case against Prudential; (6) an injunction against Miller divulging any of Prudential's confidences learned during his representation of Massaro; and (7) an order that Miller disgorge compensation he has received in connection with representation of any party adverse to Prudential.

CONCLUSION

The irony of Prudential crying foul play, fast upon allegations against the company by thousands of policyholders and employees, not to mention a $1,000,000 sanction for confirmed and willful document destruction, is not lost upon this Court.

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[16] Neither side has briefed the question of prejudice to Miller's plaintiffs, which could arguably be created by disqualifying their lawyer. Nonetheless, the Court finds that no prejudice exists because the sales agent cases are stayed and the plaintiffs will have adequate time to obtain new counsel.

Nevertheless, it must recommend that the following relief be granted Prudential on its cross-motion: (1) the disqualification of J. Bruce Miller and his firm from representing Rick Martin and other former Prudential sales agents in the pending MDL, and (2) the disqualification of J. Bruce Miller as lead/liaison counsel for sales agents in the MDL. Because the remainder of the relief sought was first raised at oral argument and was not briefed, Miller should be given an opportunity to be heard as to the availability of these remedies to Prudential. Therefore, the undersigned directs that additional briefing as to the other relief sought, in particular as to the Court's in personam jurisdiction over Miller with regard to non-MDL cases, be submitted by Prudential not later than March 7, 1997. Miller's response brief shall be filed not later than March 21, 1997.

The parties are reminded that pursuant to General Rule 40D(5), they have ten (10) days from receipt of this Report & Recommendation to file and serve objections to it.

JOEL A. PISANO
United States MAGISTRATE JUDGE

Orig: Clerk
cc: Hon. Alfred M. Wolin
All-parties
File

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

IN RE THE PRUDENTIAL INSURANCE COMPANY OF AMERICA SALES PRACTICES LITIGATION	OPINION Civil Action No. 95-612
THIS DOCUMENT RELATES TO ACTIONS	

Walls, District Judge

Before this Court is the Report and Recommendation of the Hon. Joel A. Pisano, U.S.M.J. filed on February 20, 1997. The Magistrate Judge has recommended that this Court grant the cross-motion brought by The Prudential Insurance Company ("Prudential") to disqualify J. Bruce Miller, Esq., lead/liaison counsel for plaintiff sales agents who have filed wrongful termination or retaliation claims against Prudential. Miller has filed objections to the Report and Recommendation to which Prudential has responded. Miller has voluntarily dismissed his motions to stay this Court's review of the Report and Recommendation and strike Prudential's response to his objections. For the reasons that follow, the Court will adopt the Magistrate Judge's Report and Recommendation.

I. BACKGROUND

Prudential moves to sanction and disqualify Miller on the grounds that: (1) he negotiated and procured fees for fact testimony presented by his client, former Prudential district manager

Rick Martin, during *Key v. Prudential*, an individual policyholder lawsuit tried before an Alabama jury in 1995, and (2) that he has gained improper knowledge of Prudential's client confidences through his representation of John Massaro, a corporate general counsel at Prudential and helped Massaro breach his attorney-client relationship with Prudential. Rather than set forth fully the complex progression of events out of which Prudential's cross-motion arises, the Court will paint, with broad strokes, the relevant factual background.

This matter arises out of a number of lawsuits brought by life insurance policyholders alleging that Prudential engaged in a scheme of improper and illegal sales practices. In addition to these policyholder lawsuits, a number of cases against Prudential have been filed by sales agents alleging that adverse personnel actions were taken against them because they failed to engage in illegal sales practices. In August of 1995, the Judicial Panel on Multi-District Litigation transferred all actions relating to Prudential's sales practices, including individual and class action policyholder, sales agent and whistleblower cases (collectively "MDL") to the District of New Jersey and assigned to District Judge Alfred Wolin.

A. Martin's Testimony in Key v. Prudential

Currently, there are approximately twenty sales agent cases included in the MDL and Miller is counsel for four of these plaintiffs. One of these plaintiffs is Rick Martin who, until his employment was terminated in 1992, was a district manager of Prudential in Pacudah, Kentucky. Miller began representing Martin in February 1993 and filed suit against Prudential on his behalf in January of 1995.

During the Spring of 1995, Clay Hornsby and his law firm Morris, Haynes, Ingram &

Hornsby of Alexander City, Alabama learned of Martin's lawsuit and decided that they wanted to present Martin's testimony in *Key v. Prudential*, an individual policyholder action in which they served as plaintiff's counsel. On July 29, 1995, after exchanging a series of letters and phone calls, Miller and Martin met with Hornsby and his partner Larry Morris at an airport conference room in Nashville, Tennessee. Soon after the meeting was convened the attorneys and Martin separated into two groups: Miller and Morris hammered out the financial arrangements and Martin and Hornsby discussed the content of Martin's proposed testimony. It was eventually agreed that Martin would be paid an initial fee of $7,500 for his testimony and Miller's firm would receive a $10,000 "signing bonus" for procuring Martin's testimony. On August 11, 1995, Miller deposited both payments into a trustee account. On August 17, 1995, Miller wrote a $ 7,500 check from the trustee account to Martin who deposited the check into his account on August 22, 1995. Miller used part of the $ 10,000 payment to his firm to defray expenses associated with litigating Martin's case. Later, on December 29, 1995, Hornsby's firm paid the Miller Law Group an additional $ 8, 587 for legal services rendered.

Neither Miller nor his associate Dennis Fleming was present in the courtroom when Martin testified in the *Key* case on August 23, 1995. Miller was in St. Louis conducting depositions for an unrelated legal matter and Fleming, who accompanied Martin to Alabama, left the courtroom shortly before Martin took the stand. According to Miller, Fleming left the courtroom at the request of Hornsby and Morris who wanted only local attorneys present during Martin's testimony to draw a greater contrast between Prudential's and plaintiff's legal teams. Hornsby and Morris made no attempt to qualify Martin as an expert nor did he give expert testimony. Instead, he presented about an hour's worth of fact testimony related to his experience

as a Prudential agent. While on the stand, Martin denied being aware of any financial arrangements made in connection with his testimony even though he had deposited the $7,500 check into his account the day before. The *Key* jury returned a $ 25,000,000 verdict for the plaintiff. Following the verdict, Miller received hundreds of phone calls from policyholder attorneys seeking to hire Martin as a witness. On November 22, 1995, District Judge Alfred Wolin called Miller and read him portions of Martin's *Key* testimony. Miller told the judge that he was "stunned" to discover that Martin had not given expert testimony.

B. Miller's Improper Representation of John Massaro

In December of 1996, Miller undertook the representation of John Massaro, a corporate general counsel for Prudential's Jacksonville Florida office. In 1995 and 1996, Massaro had a rolling caseload of approximately seventy sales practices cases filed against Prudential, including in-house counsel responsibility for the *Martin* lawsuit. In that capacity, he obtained local counsel for the *Martin* case, approved draft letters written by local counsel, and offered local counsel his observations regarding the case, including Miller's settlement demands. In November 1996, Miller became plaintiff's counsel in *Snowden v. Prudential*, a case for which, until August 1996, Massaro had responsibility as in-house counsel. It is noted that Massaro had been on a leave of absence from Prudential since September of 1996. The record, however, provides no explanation for his leave.

On December 16, 1996, Massaro telephoned Miller distraught over the destruction and withholding of documents by Prudential. He was so upset that his voice broke and he found it difficult to maintain his composure during the call. He told Miller that more than a year earlier,

in September of 1995, Michael Barr, a partner at Sonneschein, Nath & Rosenthal, Prudential's lead outside counsel in the sales practices litigation, had shredded a number of documents at the Jacksonville office. He also expressed his discomfort regarding Prudential's delay in turning over memoranda written by James C. Helfrich, a former in-house counsel at Prudential's Jacksonville Florida office, warning Prudential's senior management that a significant number of complaints had been received regarding improper sales practices and recommending that Prudential implement a plan to address and correct the problem Prudential did not take the actions recommended in the memoranda. In January of 1996, in response to a subpoena, Prudential produced the Helfrich memoranda to the Florida Attorney General. However, Prudential waited until July 2, 1996 before producing the memoranda to the Multi-State Task Force convened to investigate allegations of improper sales practices by Prudential and other insurance companies, even though Task Force members had earlier requested the types of documents that would have included the memoranda. Because Prudential delayed producing the memoranda, the Task Force's report did not include a definitive finding that senior management at Prudential was aware of the improper sales practices.

Massaro had earlier hired Thomas Tew, Esq. to represent him in connection with his request for a leave of absence from Prudential Tew however, was either unwilling or unable to advise and represent him regarding his document destruction concerns Massaro, claiming attorney-client privilege, has declined to answer directly exactly why Tew was not his attorney on this issue Massaro, however, has offered various reasons why he asked Miller to represent him: he claims that he obtained his name from the Internet and that he sought him out because he was the attorney most focused on document destruction at Prudential. One thing, however, is

clear. By December 16, 1996, Massaro knew that Miller was the plaintiff's attorney in the *Martin* case. Nonetheless, Massaro has minimized Miller's history with Prudential as a factor in his decision to secure him as counsel. In turn, Miller denies knowing anything about Massaro before receiving his call for representation. He claims that Massaro told him that the Sonnenschein law firm, Prudential's New York attorneys, controlled all the decisions regarding the sales practices litigation and that he and the Jacksonville, Florida office had only ministerial responsibilities regarding the litigation. Miller asserts that Massaro never told him that he had discussed settlement proposals, including one made by Miller, with local counsel.

Because Massaro enjoyed an attorney-client relationship with Prudential, and Miller was plaintiffs' counsel adverse to Prudential, Miller and his associates conducted legal research to determine if an exception to the attorney-client privilege would permit Massaro to disclose Prudential's confidences to him or others. Miller unilaterally determined that the crime-fraud exception to the attorney-client privilege permitted such disclosure. Thereafter, he undertook representation of Massaro on a *pro bono* basis. While Miller insists that his representation of Massaro was limited to the document shredding and withholding, Miller's engagement letter does not, in any way, limit the scope of his representation.

On December 23, 1996, Miller accompanied Massaro to a meeting with investigators from the Florida Attorney General's Office. Miller taped the meeting with the consent of all participants. At the meeting, Massaro expressed his concerns regarding document shredding at Prudential by Michael Barr Prudential's delay in turning over the Helfrich memoranda and for his own physical safety although, despite lengthy questioning, he never articulated justification for his fears. Immediately after the meeting, Massaro and Miller met with Scot Paltrow, a

reporter for the Los Angeles Times. During this meeting, the three men discussed what Massaro had told regulators and Massaro gave him tapes of the meeting. On December 26, 1996, Paltrow telephoned Massaro and read him a draft of the story, which Massaro apparently approved. The story was published the following day.

In January of 1997, Judge Wolin appointed a Special Master to investigate Prudential's alleged withholding of the Helfrich memoranda and Barr's document destruction. When Massaro was deposed during the Special Master's investigation early this year he was questioned about thirty-five pages of confidential notes he had written while working on cases for Prudential and which he reviewed before composing his affidavit regarding the two incidents. These notes contained Massaro's settlement strategies in *Martin v. Prudential* and his mental impressions following a conversation with Clayton Boulware, a Prudential in-house general counsel, regarding defense strategies in *Warden Cognetti v. Prudential*, the first whistleblower case that Prudential took to trial. After the deposition, Massaro and Miller both took copies of these notes and separately worked on the redactions to be made to protect Massaro's attorney-client confidences given to Tew regarding his employment issues.

Prudential subsequently brought this action to disqualify Miller based on the Martin and Massaro "subplots" to this litigation. In his Report and Recommendation, the Magistrate Judge concluded that Miller should be disqualified as lead/liaison counsel because he helped Martin obtain a fee for his fact testimony and because Miller's law firm received payment for procuring Martin's fact testimony. Specifically, he determined that Miller conveniently brokered Martin's testimony in such a way that he could plausibly deny being aware of its content and Martin could plausibly deny knowing its price. He also determined that together Miller and Martin planned to

reap financial rewards "from a testimonial dog and pony show to be billed as the trial highlight of lawsuits against Prudential across the country." (R&R at 22). The Magistrate Judge further found that Miller had benefited from Massaro's ethical violation in switching sides of this legal dispute and that neither the crime-fraud and self-defense exceptions to the attorney client privilege immunized his actions. Specifically, he found that by giving Miller a copy of the thirty-five pages of confidential, "media sensitive" notes he had written while working on cases for Prudential, Massaro unquestionably divulged confidential attorney-client communications. He determined that in order to recommend redactions that would protect Massaro's attorney-client confidences in the notes Massaro gave to Tew, Miller had to have read every single one of these notes. Accordingly, he found that Miller violated Rules 8.4[1] and 1.7 (c)(2)[2] of the New Jersey Rules of Professional Conduct by assisting Massaro's breach his attorney-client privilege with Prudential.

Miller has filed extensive objections to the Magistrate Judge's report. He argues that the Magistrate Judge erred in concluding that he was aware that Martin provided paid fact testimony during the *Key* trial, that he obtained access to Prudential's confidences while representing Massaro and that he helped Massaro breach his attorney client relationship with Prudential. In

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[1]It is professional misconduct for a lawyer to violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the act of another R.P.C. 8.4(a)

[2][I]n certain cases or situations creating an appearance of impropriety rather than an actual conflict, multiple representation is not permissible, that is, in those situations in which the ordinarily knowledgeable citizen acquainted with the facts would conclude that the multiple representation poses substantial risk of disservice to either the public interest or the interest of one of those clients. R.P.C. 1.7(c)(2)

addition, he asserts that the crime fraud and self-defense exceptions to the attorney-client privilege were applicable and thus, even if any disclosures of Prudential's confidences did occur such disclosure would have been proper.

DISCUSSION

A. Standard of Review

The court must review *de novo* those portions of a magistrate judge's report and recommendation to which objection is made. *See* 28 U.S.C. § 636(b)(1)(B); *National Labor Relations Bd v. Frazier*, 966 F.2d 812, 816 (3d Cir. 1992). A *de novo* review means that a magistrate's findings are not protected by the clearly erroneous standard but does not require a second evidentiary hearing. *See U.S. v. Raddatz*, 477 U.S. 653, 667 (1980). The district judge may accept, reject, or modify the recommended decision, receive further evidence, or recommit the matter to the magistrate judge with instructions. Fed. R. Civ. P. 72(b).

B Miller's Objections

Because Miller practically objects to the Report and Recommendation in its entirety, this Court considers *de novo* whether Miller should be disqualified for helping Martin obtain a fee for his factual testimony and obtaining a "signing bonus" for his firm and whether he should be disqualified because through his representation of Massaro he obtained access to Prudential's confidences and assisted Massaro violate his attorney-client relationship with Prudential.

As the Magistrate Judge observed, and Miller does not dispute, paying any fact witness a fee that clearly exceeds travel expenses plus reasonable time loss is an ethical violation, a

violation of the federal bribery statutes and the New Jersey Rules of Professional Conduct. *See, e.g., Golden Door Jewelry Creations, Inc. v. Lloyds Underwriters Non-Marine Ass'n*, 865 F.Supp. 1516, 1521, 1526 and n.11 (S.D. Fla. 1994). Payment for fact witness testimony that exceeds travel expenses and the value of time lost are also illegal under the federal bribery statute, 18 U.S.C. § 201 (c)(2) and violates Rule 3.4 of the New Jersey Rules of Professional conduct. (a lawyer shall not "offer an inducement to a witness that is prohibited by law.")

Miller argues that Magistrate Judge Pisano ignored key factual issues regarding Martin's *Key* testimony. For example, he claims, among other things, that the Magistrate Judge overlooked his rejection of Hornsby's request for Martin's testimony in a June 16, 1995 letter, failed to consider that all correspondence from July 3, 1995 onward between Hornsby and Miller refers to Martin's "expert testimony" or to Martin as an "expert witness," and that meeting that the Nashville meeting involved more than making suitable financial arrangements. He also claims that the Magistrate Judge improperly relied on representations by Prudential's counsel Michael Schlanger regarding the number of discussions that took place regarding the number of discussions that occurred between Martin and Miller, Martin and Fleming and between Fleming and Hornsby. He also charges that the Magistrate Judge erred in concluding that Martin did not have to refund any of the $7,500 if he spent less time working on the case. Finally, he objects to the Magistrate's characterization of his absence and that of his associate Fleming as neatly providing him with a convenient excuse to claim ignorance regarding Martin's presentation of fact testimony during the trial. He attributes Fleming's absence as acquiescence to a request by Hornsby that he not be present in the courtroom.

This Court reads Miller's numerous objections as nothing more than a desperate attempt

to salvage his role as lead/liaison counsel. None of the "facts" that he cites changes the undisputed fact that he helped Martin obtain $7,500 for an hour's worth of fact testimony and that his law firm received a $ 10,000 signing bonus for this arrangement. Nor does he make it better by pointing out that he used the money to defray the litigation costs of *Martin*. After reviewing the record in this case *de novo*, this Court believes that Magistrate Judge's findings are sound. The events appear to have been cleverly orchestrated for the purpose of later denial of knowledge of the financial arrangements.

This Court is also satisfied that the Magistrate Judge correctly determined that Miller violated ethical rules by representing Massaro and that neither the crime-fraud nor self-defense exceptions to the attorney client privilege is applicable. As noted in his Report and Recommendation, "cases giving rise to motions to disqualify often involve factual situations where an attorney or expert switches sides." (Report and Recommendation at 22). Incredibly, Miller responds to this observation with the incredulous claim that Massaro did not switch sides because he firmly believes that he is still a "loyal member of Prudential's employment" who was "compelled to differ with his employer when his employer refused to take the action that Massaro deemed appropriate from a legal and ethical standpoint . . . ." (Miller's Objections at 24.). Unquestionably, Massaro's disclosures regarding Prudential's document shredding and withholding were adverse to Prudential. Thus, Massaro switched sides. Miller then argues that Prudential has offered no proof that there is any risk that confidential information has been used unfairly He further notes that according to Massaro, the thirty-five pages of confidential notes did not contain any references to his mental impressions in the *Martin* and *Warden Cognetti* cases and that the references to *Warden Cognetti* only included comments regarding

"Compliance 101," a tape Miller asserts was no secret and which was broadcast on *Primetime Live* last December. He further argues that even assuming that Massaro's "mental impressions" were in the confidential notes, Massaro believes that the divulgence of such confidences was justified because "Miller was not aware of these notes and Affiant did not show these notes or discuss their contents with Miller until the day of Affiant's testimony before the Special Master . . ." (Miller's Objections, at 26 (quoting Massaro Deposition, Appendix J, at 8)). Equally incredible is his suggestion that he deserves praise for his decision to represent Massaro because "the effect of Miller's limited representation of Massaro has been the final substantiation before the Special Master and the recognition by the Special Master and District Judge Wolin that Prudential knowingly withheld the Helfrich memoranda from the Task Force." (Id. at 22).

In advancing these arguments, Miller misplaces the burden upon Prudential. Prudential does not have to prove that the notes contained confidential information. As the Magistrate Judge correctly explained, the "actual disclosure [of information protected by the attorney-client privilege] is not the test; rather the test is whether there is a risk that confidential information has been used unfairly." (Report and Recommendation at 23 (citing *Cordy v. Sherwin-Williams Co.*, 256 F.R.D. 575, 584 (D.N.J. 1994); *Steel v. General Motors Corp.*, 912 F.Supp 724, 738 (D.N.J. 1995), *order aff'd by*, 942 F.Supp. 968 (D.N.J. 1996)). If there are any doubts as to whether confidences were shared, counsel must be disqualified. Here, the Court has no such doubts. The record reveals that Massaro shared Prudential's confidences with Miller. At the least, Massaro shared the thirty-five pages of confidential notes, including his mental impressions of defense strategies in *Martin* and *Warden Cognetti*. In order to recommend redactions to Massaro, Miller had to have read all of the notes. No other explanation for what occurred is plausible.

Accordingly, the Court finds that Miller's representation reflects a serious ethical breach warranting disqualification.

Furthermore, the Court also agrees with the Magistrate Judge that the crime-fraud and self-defense exceptions to the attorney-client privilege do not immunize Miller's actions. The crime-fraud exception does not apply because Massaro did not disclose an ongoing fraud or crime. Over a year had elapsed before he disclosed Barr's document shredding and he knew that the Helfrich memoranda had been produced several months prior to his disclosure. In addition, the Special Master's Report concluded that neither incident could be construed as an ongoing fraud or crime at the time of Massaro's disclosure. Massaro's statements that he sincerely believed that his disclosure was necessary to prevent a crime or fraud appear to be nothing more than self-serving attempts to sanitize his decision to seek Miller's legal representation. Finally, the self-defense exception does not apply because Massaro had not been called upon to defend his conduct as an attorney for Prudential. As the Magistrate Judge explained, this is not a "close case." Even if Massaro had a legitimate concern about Prudential's conduct, Miller clearly was not the attorney appropriate to offer him legal advice and representation. Accordingly, this Court adopts the Report and Recommendation of the Magistrate Judge and will grant Prudential's cross-motion to disqualify Miller.

CONCLUSION

For the aforementioned reasons, this Court adopts the Recommendation and Report of the Magistrate Judge and grants Prudential's cross-motion to disqualify Miller.

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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

IN RE THE PRUDENTIAL INSURANCE COMPANY OF AMERICA SALES PRACTICES LITIGATION	**OPINION** Civil Action No. 95-612
THIS DOCUMENT RELATES TO ACTIONS	

The Court, having reviewed the Report and Recommendation of the Hon. Joel A. Pisano, U.S.M.J. filed on February 20, 1997, and all the submissions of the parties, and for good cause shown adopts the Magistrate Judge's Report and Recommendation and grants the cross-motion brought by The Prudential Insurance Company ("Prudential") to disqualify J. Bruce Miller, Esq. as lead/ liaison counsel for plaintiff sales agents.

William H. Walls, U.S.D.J.

17 June 1997
Dated

Tab 4

ADDENDUM 4

Disclosed Document:	**Nature/Purpose of the Communication:**
Exhibit 5 to Complaint (R.51-53) and Exhibit 1 to Affidavit of Brett G. Pearce (R. 347).	This internal memorandum summarized a confidential meeting between Mr. Spratley and State Farm's claims managers to exchange views on litigation handled by Mr. Spratley, Mr. Pearce, and other CLC lawyers. This confidential memorandum detailed candid discussions with claims personnel regarding specific aspects of legal services provided by Mr. Spratley's CLC office. They discussed preferences and strategies for discovery, settlement, and trial, as well as the best means of facilitating future attorney-client communications and reporting. State Farm submitted an affidavit showing that every sentence in this memorandum is a disclosure "incidental to the professional relationship" between plaintiffs and State Farm within the meaning of Rule 504. (See R. 643-44).
Exhibits 1 and 2 to Affidavit of Richard K. Spratley (R. 347).	These confidential letters from a State Farm Claim Superintendent to Mr. Spratley summarized discussions between the two relating to discovery, trial, and the use of experts in litigation. Spratley and Pearce do not dispute that both the letters and the discussions were confidential. These letters were unquestionably written to facilitate the legal services performed by Mr. Spratley's CLC office. (See R. 635-36).
Exhibit 2 to Affidavit of Brett G. Pearce (R. 347).	This letter from Mr. Pearce to a State Farm claims representative summarized their confidential conversation regarding settlement authority in a specific case. Plaintiffs do not dispute that both the letter and the conversation were confidential. The letter's sole purpose was to facilitate Mr. Pearce's legal services in his settlement of the case on behalf of State Farm. (See R. 644-45, 651-52).
Exhibit 4 to Second Affidavit of Richard K. Spratley (R. 690).	This e-mail from Mr. Spratley to another State Farm attorney discussed a lawsuit directly against State Farm. In the e-mail, Mr. Spratley provided factual background and legal conclusions as to the effect of his potential testimony in the case. Mr. Spratley also referenced a previous recommendation he had made to State Farm in this case, in which Mr. Spratley had provided a candid opinion of the case's merits. The e-mail's recipient, Dean Davis, has filed an affidavit stating that the e-mail was strictly confidential. (See R. 660-62). Plaintiffs have not refuted this statement.